

# REPORTS

OF

CASES ARGUED AND DETERMINED

IN

*Green & Wilson*  
THE SUPREME COURT

OF

*2883 F* *1868.*  
THE STATE OF MISSOURI.

BY

CHAS. C. WHITTELSEY,  
REPORTER.

VOL. X.

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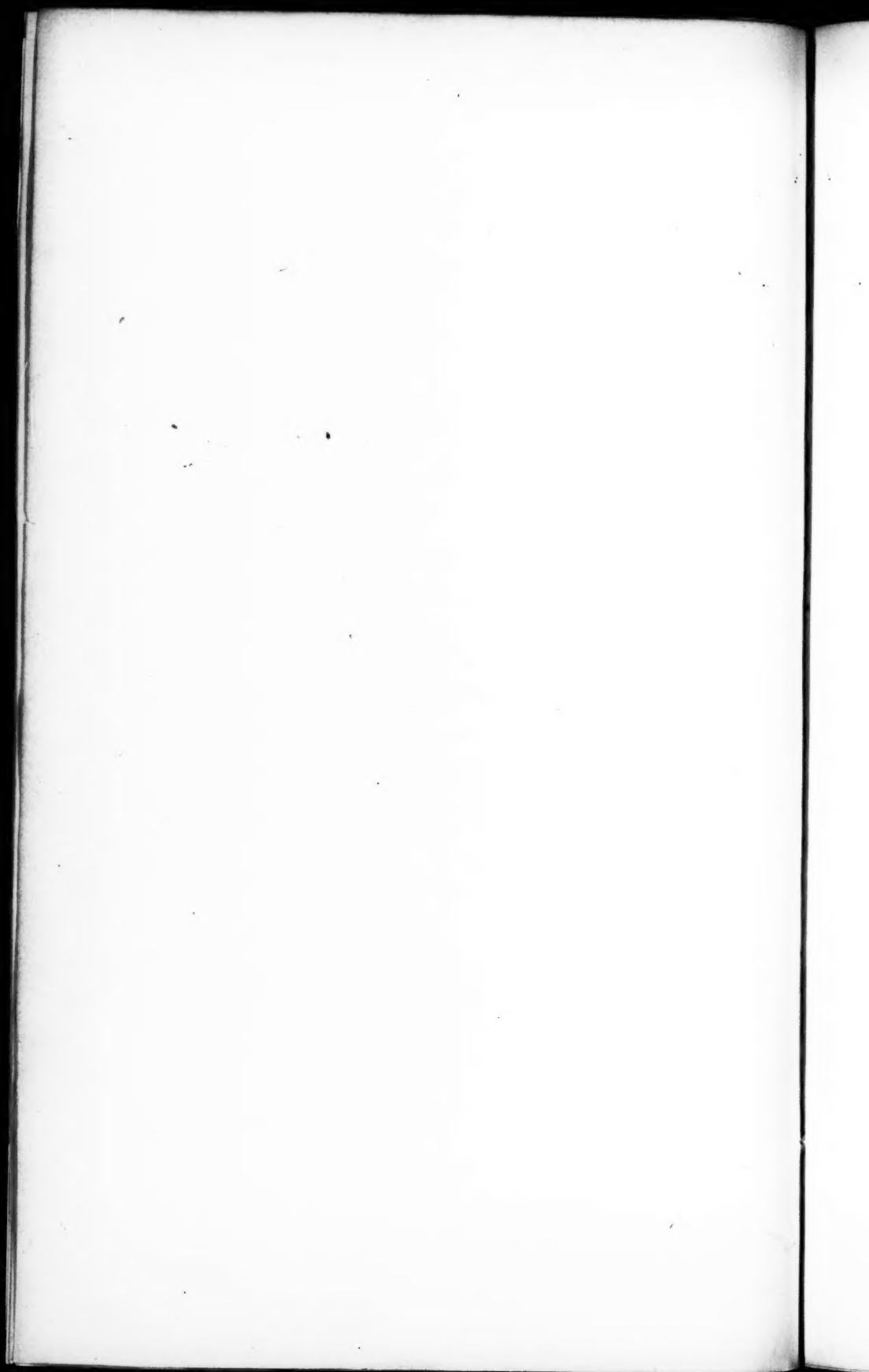
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*252*

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HON. DAVID WAGNER,  
HON. NATHANIEL HOLMES, } *Judges.*  
HON. THOS. J. C. FAGG, }  
O. T. FISHBACK, *Clerk at St. Louis.*  
N. C. BURCH, *Clerk at Jefferson City.*  
WILLIAM M. ALBIN, *Clerk at St. Joseph.*  
CHARLES C. WHITTELSEY, *Reporter.*



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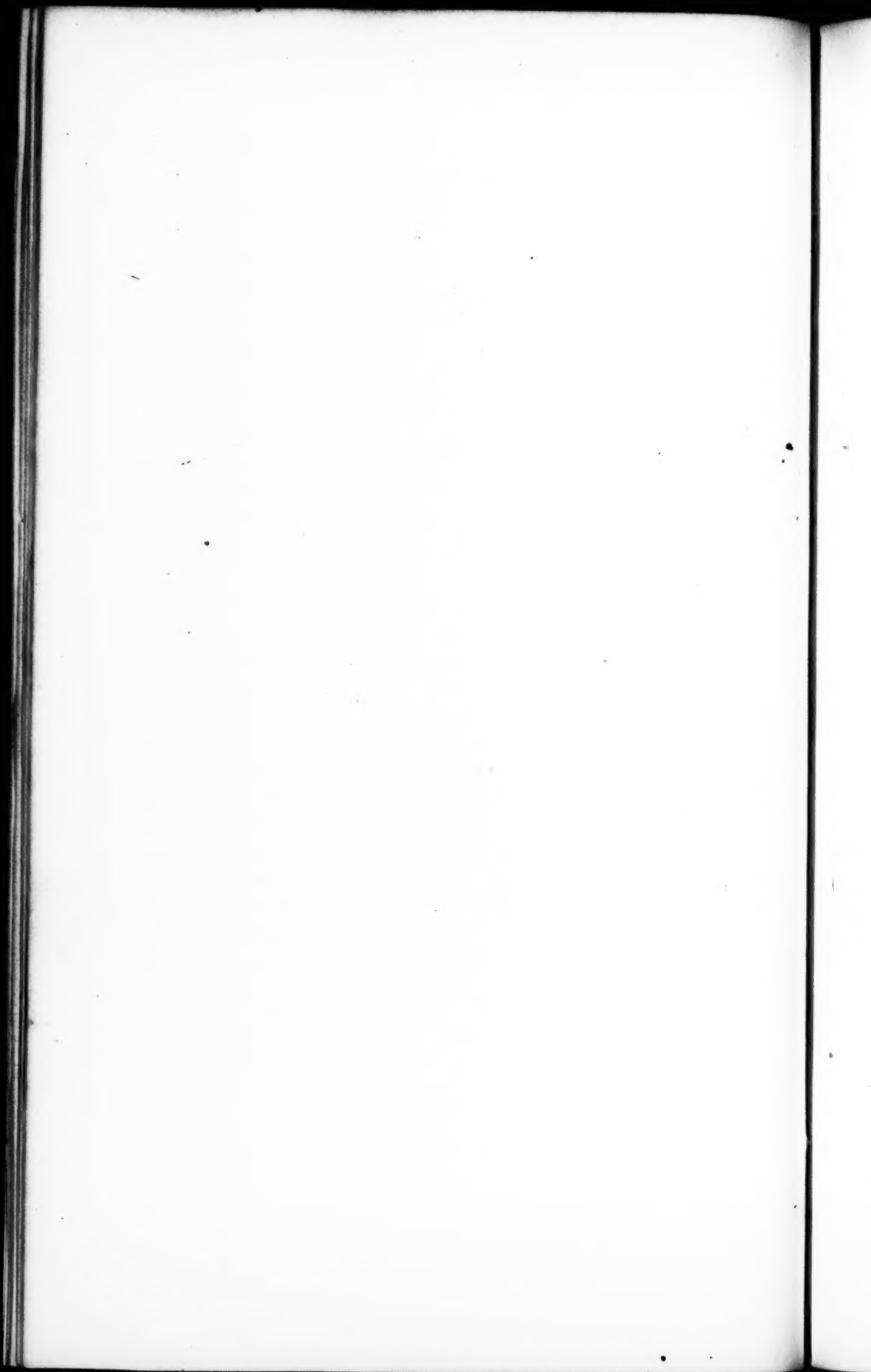
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CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
MARCH TERM, 1867, AT ST. LOUIS.

[CONTINUED FROM VOL. XL.]

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STATE *ex rel.* PETER P. DAILY, Petitioner, *v.* ALONZO THOMP-  
SON, State Auditor, Respondent.

*Revenue—Expenditures—Officers—Auditor—Accounts.*—By the statute, G. S. 1865, ch. 10, the Auditor is made the general accountant of the State as to all claims payable out of the treasury, excepting only such claims as are expressly required by law to be audited and settled by other persons. A claim for costs for services rendered by the clerk of the St. Louis Criminal Court, although duly certified by the judge of that court and the circuit attorney, does not come within the class of excepted cases, and the Auditor may go behind the certificate and refuse to audit the claim. (See *Morgan v. Buffington*, 21 Mo. 549; *State ex rel. McMurtry v. Auditor*, 37 Mo. 176.)

*Application for Mandamus.*

Isaac T. Wise, for petitioner.

R. F. Wingate, for respondent.

FAGG, Judge, delivered the opinion of the court.

This is an application for a mandamus upon the State Auditor, made by Peter P. Daily, clerk of the Criminal

Court of St. Louis county, requiring him to audit and settle a bill of costs accompanying the petition, and to draw his warrant therefor. The bill of costs is shown to have been approved and duly certified by the judge of said court and the circuit attorney for St. Louis county in the manner required by law.

The question presented for determination arises upon a demurrer to the petition, and the facts upon which the application is made are therefore to be taken as true. This question is analogous to the one decided by this court in the case of *Morgan v. Buffington*, 21 Mo. 549. In that case, the petitioner, being a member of the House of Representatives, presented his claim for services in that capacity, duly made out and certified by the speaker and clerk of the House in the manner prescribed by the statute. It was claimed that the account was to be taken as audited, and that the Auditor had no right or power to go behind this certificate and inquire into the correctness of the claim. It was held by the court, that from the very nature of his office, and the powers and duties conferred upon him by law, there was no doubt of his authority to do this. This position was also taken in the case of the *State ex rel. McMurtry v. Auditor*, in 37 Mo. 176. The power of the Legislature to make a voucher conclusive upon the Auditor so as to require him, without an investigation, to draw his warrant upon the Treasurer, was not denied.

By the express terms of the statute the Auditor is made "the general accountant of the State." He is required to "audit, adjust and settle all claims against the State, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers and persons"—G. S. p. 86, §§ 10 & 13, ch. 10. The 31st section of the same chapter provides as follows: "If any person interested shall be dissatisfied with the decision of the Auditor on any claim, account or credit, the Auditor shall, at the request of such person, certify his decision, with his reasons therefor, specifying the items reject-

ed, if less than the whole, under the seal of his office, and refer the same to the General Assembly." These preliminary matters have been set out for the purpose of showing the extent of the powers conferred upon this officer by law. In the very nature of the case they are large, and cover every class of claims against the State unless otherwise expressly provided for by law. The wording of the statute is peculiar, and leaves no room to imply the power of any other officer or person. His duties and responsibilities in guarding the expenditure of the money belonging to the State are so weighty, and the necessity for their proper performance so directly pressing upon him, as to leave no room for implication. Whenever, therefore, it is intended that a claim against the State shall be audited by a different person or officer, so as to take away the general power and responsibility from the Auditor, it must be made to appear by the plain and express provisions of a legal enactment.

This is a power, of course, which the Auditor cannot exercise in an arbitrary manner, so as to defeat the payment of a just claim against the State. The law expressly provides for a reference of the matter to the General Assembly in every case where there is a refusal on the part of the Auditor to allow the demand and draw his warrant therefor. This may not be as speedy a way of obtaining justice as a party might desire, but still it is the way pointed out by the statute, and which he may pursue or not at his pleasure. It is, however, not the only remedy; for a party may still resort to the courts to compel the Auditor to allow the claim and draw a warrant therefor, if it can be shown to be such as the laws of the State will authorize the payment of.

Upon the case presented here, we do not feel called upon to examine this claim for the purpose of ascertaining whether it ought to be allowed or not. The only point is, whether it comes within the reasoning of the court in the cases referred to as heretofore decided. The certificate of the judge or circuit attorney is required to set out specifically certain facts in reference to such claims, among which is the fact

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that the services set out in the bill of costs were rendered, and that compensation for the same is given by law. This is held to be a judicial determination of the correctness of the claim, and sufficient to conclude the Auditor from any further investigation of the facts. If this provision stood alone it might go very far towards establishing such a conclusion; but, taking it in connection with the sections of the statute hereinbefore quoted, we conceive the true intent of the law to be simply to furnish him with the testimony of the parties who from their official positions are presumed to have a correct knowledge of such facts, and whose duty it is made to certify them correctly. The substantial part of such a certificate, at last, is the statement that the services charged for have actually been rendered. It is evidently the intention of the statute to furnish this sort of proof as the most convenient and reliable that the case admits of, and at the same time to provide a check upon the clerks in charging for services which in point of fact may not have been rendered at all, and which might nevertheless be allowed and paid for but for the required examination. It is not, in our judgment, one of the claims "*expressly required by law to be audited and settled by other officers and persons*" within the meaning of sec. 13, ch. 10, of the Gen. Stat., and the Auditor is not concluded by the certificate.

The demurrer must therefore be sustained. The other judges concur.

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STATE OF MISSOURI *ex rel.* SANDFORD B. KELLOGG, Petitioner,  
v. WILLIAM BISHOP, State Treasurer, Respondent.

1. *Statutes—Construction—Evidence.*—When the mind of the Legislature has been turned to the details of a subject and it has acted upon it, a subsequent statute in general terms, or touching the subject in a general manner, and not expressly contradicting the original act, will not be construed as intended to affect the more particular or positive previous provisions, unless it be absolutely necessary so to do in order to give any meaning to the words of the later statute. The law does not favor a repeal of statutes by implication.

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2. *Revenue — Union Military Bonds — Appropriations.*— The act of March 9, 1863 (Acts 1863, p. 25), appropriated the funds therein named, when the same should be received, to the payment of the Union military bonds to be issued under said act. The bonds issued under the act of February 25, 1865 (Acts 1865, p. 59), were to be paid out of the same fund, and the act of March 13, 1866 (Acts 1866, p. 95), provided the method of payment. The acts of March 11, 1867, and March 12, 1867, providing for a School fund, &c., did not repeal the provisions of the preceding acts providing for the payment of Union military bonds.

*Petition for Mandamus.*

*Knox & Smith*, for petitioner.

The act of March 9, 1863, under which the Union military bonds were issued, created a fund called the "Union military fund," and pledged the same for the payment and redemption of all the bonds issued, principal and interest.

The act appropriates certain taxes "levied and to be collected" to that fund; in like manner it appropriates "all money that may come into the treasury of the State from appropriations made by the Congress of the United States to the State of Missouri for the purpose of paying the military forces thereof, or for indemnity for expenses incurred in suppressing the rebellion." All money appropriated to said fund "shall be set apart by the Treasurer for that purpose only"; that is, for the redemption of Union military bonds, principal and interest.

Congress, by an act passed April 17, 1866, made an appropriation to the State of Missouri for the purpose of paying the military forces thereof, and for expenses incurred in suppressing the rebellion, to the amount of six and a half millions, and \$600,000 of it has been paid into the treasury of the State. By the act of March 9, 1863, that money is not only pledged for the payment and redemption of outstanding overdue Union military bonds, but the Treasurer is directed to set it apart for that purpose only.

In contemplation of law, the appropriation by Congress, as soon as made, was set apart and pledged in good faith most sacredly for the payment of the Union military bonds. When

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the draft for \$600,000 was signed and delivered, payable to the order of the State Treasurer, in contemplation of law the money was in the Union military fund, available for the payment or redemption of said bonds. The act of March 12, 1866, directs how said fund shall be applied or paid out in redemption of overdue Union military bonds. The Treasurer has no discretion.

The question now arises, have those two acts of March 9, 1863, and March 12, 1866, or either of them, been repealed? The recent acts of March 11 and 12, 1867, creating the School fund, and to provide for the payment of the State indebtedness, do not in terms repeal them. In the absence of express words, a subsequent act in regard to the same subject matter will not be construed to repeal the former unless totally inconsistent with it; in other words, the court will carry out and give effect to both laws if such construction be possible. But when the repeal of a law is in direct violation of the pledged public faith, and will work injustice and injury to the State credit and creditors, and in violation also of the vested rights of those who received and hold said Union military bonds, relying upon their prompt redemption out of a special appropriation made by Congress to the State, and guaranteed or set apart for that purpose only, nothing less than clear, express words to that effect would warrant the conclusion that the Legislature intended to repeal the law.

An apparent inconsistency or contradiction consists in the use of the word "first," in the act creating or providing a "School fund," to designate the moneys set apart and to be invested in United States bonds. The object of the law is effected if \$1,500,000 are set apart out of the appropriation made by Congress from the Union military fund after redeeming the pledged faith of the State in the payment of the Union military bonds. The time in this case is not material; the U. S. bonds can be purchased at any time, and the interest accruing is alone applicable for the use of the Public Schools. The amount appropriated by Congress is ample for the purpose of said law, being six and a half millions.

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The word "first," in said act providing for a School fund, obviously should be construed to mean the first money received from the appropriation by Congress available for the purpose of the law. The word "first" was used in said law in reference to the pending act for the payment of the State indebtedness out of the surplus received from Congress after paying the Union military bonds. It is a well known fact that it was so used, and the passage of the law providing for a State School fund was insisted upon by its friends as a condition precedent to the passage of the law to pay the State overdue coupons out of the surplus of said appropriation.

Attorney-General, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The petitioner states that, on the first day of May, 1867, he presented at the office of the State Treasurer certain "Union military bonds" of the issues of 1863 and 1865, amounting in all to some forty thousand dollars, and requested the Treasurer to receive, arrange and pay the same as required by law; that on that day the State Treasurer had in the treasury, or subject to his order, besides other money, the sum of six hundred thousand dollars received from the appropriations made by Congress to the State of Missouri for expenses incurred in suppressing the rebellion, and being money which had been appropriated and pledged by the act of the General Assembly of the State, approved March 9, 1863 (Laws 1863, p. 25), for the purpose of redeeming Union military bonds; that said money, so being in the treasury, was sufficient to pay *all* the bonds presented by the petitioner on the day aforesaid, and that the Treasurer had refused to pay the same: wherefore, he prays for a writ of mandamus.

The answer of the defendant admits the facts stated in the petition, but alleges in justification of his refusal to pay said bonds, that the money received out of the appropriation by Congress had been specifically disposed of and appropriated

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under the acts of the General Assembly of the State. The one entitled "An act creating a permanent School fund," approved March 11, 1867; and the other entitled "An act to provide for the payment of the interest upon the State debt," approved March 12, 1867 (pp. 166, 168, Laws 1867)—first, for a permanent School fund, and second, "for the Seminary fund and to pay outstanding Union military bonds," and for the payment of interest on the public debt incurred on account of railroads; that the said sum of six hundred thousand dollars was the first and only money yet received into the treasury from the United States under the act of Congress, and that, therefore, he was not required nor permitted by law to pay these bonds of the plaintiff out of this money. The act of March 9, 1863, created a fund to be called the "Union military fund," which was made to consist of "all moneys that may come into the treasury of the State from appropriations made by the Congress of the United States to the State of Missouri for the purpose of paying the militia forces thereof, or for indemnity for expenses incurred in suppressing the rebellion, or by loan for that purpose, and of other moneys to arise from taxes and other sources mentioned"—Laws 1863, p. 27, § 9.

By the act of the General Assembly, approved February 20, 1865 (Laws 1865, p. 59, §§ 1, 6), another issue of Union military bonds of like description was authorized and made payable out of the Union military fund created by the previous act, provided that if Congress, during its then present session, should pass an act to furnish the means of paying the liabilities of the State incurred for military defence, then the bonds thereby authorized should not be issued, but the militia should be paid out of the funds thus furnished by Congress.

The act of March 12, 1866 (Laws 1866, p. 95), provided in what manner these Union military bonds should be presented, arranged and paid, and in what order of priority between the several issues, so long as any means remained in the fund for that purpose.

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All these bonds were issued, negotiated and received by the holders thereof on the strength of these acts, and on the credit of the fund so created and pledged for their redemption.

By the act of March 11, 1867, above cited, a permanent School fund was created, and there was thereby "appropriated the sum of one million five hundred thousand dollars out of the *moneys to be and first received* from the United States under the provisions of the act of Congress entitled "An act to reimburse the State of Missouri for moneys expended for the United States in enrolling and equipping and provisioning the militia forces to aid in suppressing the rebellion, approved April 17, 1866, which appropriation shall be held and sacredly preserved as a Public School fund."

On the next day the act of March 12, 1867, was passed, by which, among other things, it was provided that all the moneys received under the act of Congress aforesaid, "after reserving out of the *first moneys so received* fifteen hundred thousand dollars to carry out the provisions" of the act creating a permanent School fund, "and a further deduction of five hundred thousand dollars for the Seminary fund, and to pay outstanding Union military bonds," should, by order of the Governor, be placed as fast as received from the United States on deposit in bank in New York, to the credit of the State, to be paid, as the commissioners of the State interest fund should direct, upon the overdue coupons of the State bonds issued for certain railroads.

There is no room for doubt that these bonds of the plaintiff were payable out of the Union military fund in the manner prescribed by the statutes, nor that this fund, which was created and solemnly pledged for their redemption, included the anticipated appropriation by Congress, which was made for the very purpose of indemnifying the State for the expenses incurred in suppressing the rebellion, and for the very object for which these bonds were issued and the fund created; and all the moneys which were to come into this fund, under the act, were specifically appropriated to the purpose

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of redeeming these bonds. It is clear also that the moneys which have been received by the Treasurer from the United States, under the act of Congress, and placed subject to his order, are precisely of the character and description of the appropriations contemplated by the Legislature in the act of 1863.

The State Treasurer rests his objection to paying these bonds out of the money received from this appropriation by Congress upon what he conceives to be the correct construction of the acts of March 11 and 12, 1867. It may be presumed that his refusal proceeds rather from a reasonable anxiety to be surely protected in his official action than from any disposition to evade his duty under the laws; and the determination of the case depends upon the construction to be given to these two acts.

The defendant's construction is, that the words "*to be and first received,*" and "*the first moneys received,*" refer strictly to the time of reception, and that the appropriation is absolute of this money to the specific objects contemplated by those acts only. It is plain that if this construction were correct the result would be, that the Legislature has repealed, and intended to repeal, the former laws, by which this money was specifically appropriated and solemnly pledged for the redemption of Union military bonds, and diverted the money from the Union military fund in plain derogation of the act and pledge of the previous Legislature, and in direct violation of the honor and good faith of the State.

We may unhesitatingly assume in the outset that no such intention is to be imputed to that honorably body in the passage of these acts, unless the former acts have been thereby repealed in express words, or by necessary implication; so that the several enactments cannot admit of any other reasonable construction.

Let us see, then; and first, it may be observed that there are no expressed words of repeal in either of the two acts. The subject matter of the former law was not then directly in question before the Legislature. The objects contem-

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plated by the later acts were the creation of a permanent School fund, the restoration of the Seminary fund, and the payment of interest on the public debt. The Union military bonds had been to a large extent paid off out of moneys coming into the fund from the other sources mentioned in the act of 1863. The appropriation by Congress was greatly larger than the amount required to pay what remained unpaid of these bonds, and it is fairly to be inferred that it was the purpose of the legislative mind to dispose of the whole remainder of that appropriation, after the particular object for which it had been previously appropriated, and was expressly granted by Congress, had been fully answered under the former laws. The two acts were pending before the Legislature at the same time; one being passed on one day and the other on the next. It may be distinctly gathered that the chief object was to secure, first, out of this disposable subject a permanent School fund, and second, the extinguishment of the public debt.

In the second act, looking to the public indebtedness and the appropriation by Congress, they begin by saving out of the appropriation, first, the Public School fund created the day before, and next, a further deduction of half a million for the Seminary fund, and also, and over and above all, the amount necessary "to pay Union military bonds" (for the payment of which the whole appropriation had been already and long before solemnly appropriated and pledged); and lastly, the whole remainder was to be applied to the overdue coupons on the State bonds issued for railroads.

In this view, the words *first received* may fairly and justly be interpreted to mean money first received into the treasury and disposable for the objects contemplated by these two acts, not already appropriated to another specific purpose for which the faith of the State had been pledged, and was therefore not to be touched; and that the word *first*, in the mind of the Legislature, referred to the first object, the permanent School fund, in preference to the second object, the payment

of the public debt, and not at all to the mere date and absolute time of reception.

The introduction of the words "*and to pay* outstanding Union military bonds" into this second section of the act of March 12, is somewhat loose and peculiar. It might be conjectured that a few words, such as *the amount necessary*, may by some accident have been dropped out of the draft of the bill; but it is unnecessary to resort to any supposition of this kind, for the true meaning and design of the act to save and except, out of the appropriation then intended to be made, enough to answer the existing appropriation for military bonds, may be clearly seen by looking through the mere forms of expression into the real object, purview and intention of the statutes.

The rule of construction which has been laid down on unquestionable authority, as applicable to a case of this kind, is, that "when the mind of the legislator has been turned to the details of the subject, and he has acted upon it, a subsequent statute in general terms, or touching the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provision, unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all"—Sedgw. on Stat. & Const. Law, 123. The law does not favor a repeal by implication unless the repugnance be quite plain; and two seemingly repugnant statutes should, if possible, have such construction, that the latter may not be a repeal of the former by implication—Dwar. on Stat. 533.

Applying this and all other rules of construction to these statutes, we cannot doubt that the foregoing is the proper view to be taken of them; that there is no repeal of the former laws by express words or by necessary implication; that there is no essential repugnancy, but that all may stand consistently together; that this money belongs to the Union military fund, and is applicable, first of all, to the redemption

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of these Union military bonds until the same are fully paid off; that such was the intention of the Legislature, and must be the proper legal effect of all these laws taken together; and that there has been no intention, nor act of the Legislature, amounting to a breach of the public faith solemnly pledged. We should be doing injustice to ourselves, to the Legislature, and to the State, could we even think of holding otherwise.

A peremptory mandamus will therefore be ordered. The other judges concur.

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STATE OF MISSOURI *ex rel.* THOMAS A. PARKER, State Superintendent of Public Schools, Relator, *v.* ALONZO THOMPSON, State Auditor, Respondent.

1. *Statutes—Construction—Evidence.*—Every act of the Legislature must be held to be prospective in its operation, unless a different effect is clearly to be gathered from its terms.
2. *Revenue—School Fund—Appropriation.*—By the statute, G. S. 1865, p. 269, § 59, the twenty-five per cent. of the general revenue of the State, to be appropriated to the University and Public Schools, is to be taken from the revenue collected in the year 1867. The act of March 13, 1867, repealing the proviso of § 59, p. 269, G. S., did not act retrospectively to appropriate the revenue collected in 1866.

*Petition for Mandamus.*

Relator, *pro se.*

Respondent, *pro se.*

FAGG, Judge, delivered the opinion of the court.

This is an application for a mandamus upon the State Auditor, requiring him to certify to the relator, as State Superintendent of Public Schools, the amount of revenue now in the State treasury applicable to the support of said Schools, and subject to be apportioned among the several counties in the State for that purpose in the present year.

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The 59th section of ch. 46, p. 269, after enumerating specifically several sources from which a fund for the support and maintenance of Public Schools is to be created, contains the following provisions: "the income of which, together with twenty-five per cent. of the State revenue, shall be applied annually to the support of the Public Schools and University provided for in this act, to be divided and apportioned as hereinafter provided; provided, that the twenty-five per cent. of the State revenue shall not be applied to the support of the Public Schools or University until the year 1867."

It is claimed that this provision amounts to a direct appropriation of money from the State treasury, to be apportioned by the Superintendent, and applied to the support and maintenance of the Public Schools for the present year. If so, it would follow that one-fourth of all the money in the State treasury on the 1st of March, 1867, not directly appropriated by acts of the Legislature passed previous to the enactment of the School law, should be set apart for that purpose.

We take it that the intention of the Legislature is to be gathered from the terms of the act. Nothing appears upon its face which would authorize a resort to any other mode of interpretation. The addition of this proviso to the section was certainly intended to subserve some specific purpose. Let us see what that was: The act in question was passed in the session of 1865 and 1866, and incorporated among the general statutes of the State. No time was specified by the act itself as to when it should take effect. By the provisions of a general statute upon that subject, however, the 1st day of August, 1866, was fixed when all laws should go into operation, unless a different time had been expressly designated.

Section 80 of the School law directs, "that the State Superintendent of Public Schools shall, annually, in the month of March, apportion the Public School fund, applied for the benefit of the Public Schools, among the different coun-

ties upon the enumeration and returns made to his office," &c.

The enumeration and returns here spoken of are required to be made by the clerks of the several County Courts to the State Superintendent, on or before the 1st day of November in each year. Now, if the 59th section of the act, at the time it went into operation, had stood alone without the proviso in question, there could have been no controversy as to what was really intended. Twenty-five per cent. of the revenue collected and paid into the treasury on or before the month of March, 1867, would have been the amount to be apportioned by the Superintendent, and which, under that apportionment, should be applied to the support of the Schools for that year.

Nothing could have been plainer and less liable to misconstruction than it would have been in that shape. But the Legislature thought proper to attach this proviso, the effect of which—if any force and effect whatever is to be given to it—is to change the plain and obvious meaning of the section as it would stand without it. In the very nature of things, then, it must have been intended that the first application of this portion of the School fund was to be of the twenty-five per cent. of the State revenue collected in the year 1867.

On the 13th day of March, 1867, the Legislature then in session passed an act repealing this proviso, and leaving the remainder of section 59 to stand precisely as it did when first enacted. We are asked to take this act as a true interpretation of the intention of the Legislature, inasmuch as attention had been called to the difficulty of giving a proper construction to the law as it stood originally.

We cannot perceive that this last mentioned act changes the effect of the section in any particular. The proviso had already spent its whole force in excluding from apportionment in the present year twenty-five per cent. of the revenue of 1866. It is made to take effect from and after its passage.

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There is nothing in its terms to show that it was intended to be retroactive in its operation, so as to embrace the State revenue for the year 1866. If this had been the intention of the Legislature, twenty-five per cent. of the revenue for that year ought to have been especially designated and set apart by the repealing statute.

It is a well settled rule for the construction of statutory law that every act of the Legislature must be held to be prospective in its operation, unless a different effect is clearly to be gathered from its terms—*Sayre v Wisner*, 8 Wend. 661; *Hastings v. Lane*, 3 Shep. 134; *Brown v. Wilcox*, 14 S. & M. 127; *Quackenbush v. Dank*, 1 Denio, 128.

In the matter of private rights, any other rule of construction would work great injustice, and it is conceived that its effect as to all questions affecting the interests of the public at large must be to produce great inconvenience and confusion. We think, therefore, that by our application of the rules which ordinarily govern in the construction of statutes, there can be no doubt as to the proper force and effect of the act as it now stands.

Whether the Public Schools of the State are to be injuriously affected by such a construction or not, is a question with which this court can have nothing to do, even if it could be shown affirmatively that the cause of public instruction would suffer greatly by withholding this portion of the School fund until the year 1868; still it does not present a consideration sufficient to change what we conceive to be a plain and just interpretation of the law.

This examination of the question involved in the application of the relator and the answer of respondent, covers the real point at issue, and we do not feel called upon to discuss any collateral points that may have been suggested.

The other judges concurring, the peremptory mandamus will be refused.

STATE OF MISSOURI, by ROBERT F. WINGATE, Attorney-General, Plaintiff, v. AMADÉE VALLÉ, Defendant.

*Constitution—Legislature—Officer.*—The officers of a municipal corporation are civil officers within the meaning of the provisions of the Constitution, Art. IV., § 15. A member of the General Assembly, therefore, cannot be appointed to an office under such corporation, which has been created or the emoluments of which have been increased during the term for which he was elected. A member of the Legislature receives a compensation for his services as a civil officer, and holds an office of profit as well as honor, and is therefore prohibited from holding office as a member of the Board of Water Commissioners for the City of St. Louis, by the provisions of the act creating the board—§ 5, Acts 1866-7, p. 185.

*R. F. Wingate, pro se.*

*Knox & Smith, for defendant.*

HOLMES, Judge, delivered the opinion of the court.

This is an *ex officio* information in the nature of *quo warranto*, and the case is submitted on demurrer.

The defendant, a member of the House of Representatives, elected in November, 1866, from the Fifth district of the City of St. Louis, for the twenty-fourth General Assembly, (which is not yet dissolved,) was appointed one of the Board of Water Commissioners for the City of St. Louis, in and by the act of the General Assembly, (approved March 13, 1867,) of which he was at the time a member, and entered upon the duties of the office; and the question is whether he was eligible to that office under the constitution of the State, which provides that "no Senator or Representative shall, during the term for which he shall have been elected, be appointed to any *civil office under this State*, which shall have been created, or the emoluments of which shall have been increased, during his continuance in office as a Senator or Representative, except to such offices as shall be filled by election of the people"—Const. art. 4, § 15.

Three persons named were by the act appointed and constituted a Board of Water Commissioners for the City of St.

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Louis, with full powers to act as such until the first day of June, 1871, when their term of office is to end and determine; (sec. 2,) and then the mayor, with the advice and consent of the city council, is to appoint the commissioners for a term of four years, and until their successors are appointed and qualified. (Sec. 21 :) They are to have an annual salary of three thousand dollars; but it is not expressly said in either section whether this salary is to be paid by the State or by the city. It may be gathered, however, from the general tenor of the act, that it was the intention of the Legislature, and it will be taken to be the proper effect of the act, that this salary is to be paid by the city. The city is authorized, through the agency of this board, to take measures in the manner prescribed, to obtain a supply of water from the Mississippi river for the use of the city. The general effect of the act is to invest this board of commissioners with the necessary powers to accomplish this object. All their powers are derived from the act. The board is made a part of the local administration of the city. They hold their offices under the statute, as the mayor holds his office under the city charter.

That this is a civil office, and not a mere agency or an employment under contract, would seem to be very clear. In the case of *Primm v. City of Carondelet*, 23 Mo. 22, a city counsellor appointed under an ordinance of the city, after the office had been abolished by a repeal of the ordinance, claimed that he was employed by the year under contract; but it was held that it was a civil office in which he had no vested right, which he might resign at will, and which might be abolished at the pleasure of the city; and he was allowed to recover his salary only for the time he was in office. So these commissioners may resign, or the act may be repealed and the offices abolished. Certain commissioners appointed by an act of the Legislature to sign city treasury warrants, which were to be delivered to the city treasurer, and issued by the city to circulate as money, were held to be State officers, and they were not allowed to recover against

the city corporation a compensation for their services on a *quantum meruit* as upon an implied contract, and as mere agents employed by the corporation, when no provision has been made by the act for any salary. They were held to be civil officers under the State—*Garnier v. City of St. Louis*, 37 Mo. 554.

The government is the fountain of office, and civil officers have a right to exercise a public employment and take the fees and emoluments thereunto belonging—1 Black, Com. 272; 2 id. 36. A civil office is a grant and possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office; and it is distinguished in this respect from a mere employment as a contractor or agent under some public office—3 Mo. 481; *Commonwealth v. Binns*, 17 Serg. & R. 219; *Samson v. Sutherland*, 13 Vt. 309; *County of Yalabusha v. Carbry*, 3 Smed. & Mar. 550.

The Legislature had the constitutional power to establish this board of commissioners as a part of the local administration of city affairs, and to appoint the officers, and to provide that they should be paid out of the city treasury; and, as a body constituted for purposes of civil government, they are unquestionably *civil officers under this State*—*People v. Draper*, 15 N. Y. 532; *Hamilton v. County Court*, 15 Mo. 3; *Daly v. City of St. Paul*, 7 Minn. 390.

In a certain popular acceptance, the words *civil office under this State* might possibly be interpreted to mean *State officers* in the sense of participating directly in the administration of the State government as such; but they are none the less civil officers under this State because their functions are confined to the local administration. The offices are created and the officers are appointed, and their powers given, and their duties defined, and their salaries fixed, directly by act of the Legislature. They exercise a share of the powers of civil government, and their authority comes directly from the State. They are to be considered as much

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civil officers under this State as the judge of a court, or the mayor of the city. They would be none the less so if appointed by the mayor; for they would still derive all their powers from the act which creates the office. The mode of appointment is not material.

We think the defendant was clearly ineligible to this office, under the Constitution, during the term for which he was elected a representative.

There is another provision in the act itself which would preclude him from holding both offices at once. The fifth section provides that the members of the board "shall devote their entire time and attention to the duties of their said office, and shall not hold any other office of profit, or attend to any other business as an occupation." A member of the Legislature receives a compensation for his services as a civil officer, and holds an office of profit as well as of honor.

There being no evidence of any wrongful intention, no fine will be imposed, but judgment of ouster and costs will be entered. The other judges concur.

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STATE OF MISSOURI *ex rel.* THE ATTORNEY-GENERAL, Plaintiff,  
v. JAMES M. POOL, Defendant.

*Constitution — Executive — Commission — Officer — Sheriff.*—The Constitution, Art. V., § 25, requires the Governor to commission all officers when not otherwise provided by law. The statute, G. S. 1865, ch. 16, has made no provision for issuing a commission to the person elected to the office of sheriff, and therefore he cannot assume the duties of the office until he is duly commissioned by the Governor.

*Information in the nature of Quo Warranto.*

*Glover & Shepley*, for defendant.

I. The case turns upon the effect of the alleged commission issued by the Governor to Thomas Adamson for the same office, sheriff of Lafayette county, to which the pleadings admit Pool was legally elected. The new Constitution

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declares "the Governor shall commission all officers not otherwise provided by law"—Art. 5 & 25, R. C. 1865, p. 35.

If from the necessary operation of any law or laws in force it appears that a sheriff shall discharge the duties of his office without a commission, then the said law or laws are to be considered a provision dispensing with a commission in such case. If this be so, it is evident that no commission need be issued by the Governor to any elected sheriff under our statutes—Ch. 25, R. C. 1865, p. 156.

It is important to the public interests that the evidences of the sheriff's title to his office and his obligation to the public shall be preserved and placed within the reach of all; hence the requirement to record—(1) The certificate of election; (2) the oath of office; (3) the endorsements thereof; (4) the official bond; (5) the approval and endorsement thereof;—and all this is cared for by sec. 7.

The Constitution itself contains a special provision in that respect to sheriffs which is very pertinent to this question. It says (art. 5 & 22): "There shall be elected by the qualified voters in each county, at the time and place of electing representatives, a sheriff and coroner; they shall serve for two years, and until a successor shall be duly elected and qualified, unless sooner removed for malfeasance in office, and be ineligible four years in any period of eight years. Before entering on the duties of their office they shall give security in such amount and in such manner as shall be prescribed by law." This provision is the same in substance with that in the Constitution—R. C. 1865, p. 74, art. 9 & 16. This provision is fully satisfied by giving the bonds according to law. The 1st section of ch. 16, R. C. 1865, p. 138, declares that "all officers elected or appointed by the authority of the laws of this State shall hold their office until their successors are elected or appointed, commissioned and qualified."

The New York statutes in relation to sheriffs is much like ours—*People v. Holly*, 12 Wend. 481; *Hines v. Doubleday et al.*, 21 Wend. 223. These cases hold that the effect of

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giving bonds, and qualifying on the certificate of election, is to put the sheriff in his office, and that the election gives title to the office. One who has given bonds is an officer *de jure*—Commonwealth v. Slifer, 25 Pa. 31.

In Illinois it is held sheriffs are to be commissioned—The People v. Fletcher, 2 Scam. 486. The statute of Illinois, R. C. 1845, p. 514, directs the commission to be forwarded by the Secretary of State to the clerk of the Circuit Court of the proper county, and by him notified to the sheriff, who shall thereafter enter into bonds, &c.

Under the Kentucky Constitution of 1792 sheriffs were to be elected, and before entering upon the duties of office to give bond, take oath, &c.—1 Litt. 30. It was held under this provision that no commission was required—2 Litt. 61.

Sheriffs are commissioned in New Jersey, and the statute provides the means of laying before the Governor the facts of election and procuring his commission—State v. The Governor, 1 Dutcher, 346; Rounds v. Mansfield, 38 Me. 588; Rounds v. Bonger, 46 Me. 541; Thomasson v. Justices, &c., 3 Humph. 233; Williamson v. Webb, 2 Humph. 233; State v. Yates, 1 Riley, 261; Allen on Sheriffs, 16-18.

II. But conceding that a sheriff elect is entitled to a commission in pursuance to his certificate of election, and that it is the duty of the Governor to issue such commission, the failure of the Governor to do so is not to vacate the office of the duly elected and inducted sheriff. The constitutional provision is: "The Governor shall commission all officers not otherwise provided by law." It gives to the executive no discretion. If the Governor refuse to commission the officer, he violates the law; and no damage can come to the innocent party from such violation of the law. This constitutional provision does not mean that the Governor may commission any one else whom he pleases, and thus arbitrarily substitute his election for the election of the people.

The demurrer asserts that Pool was legally elected sheriff and was legally inducted; and simply because the Gov-

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ernor has commissioned one not elected, asserts for that commission an almighty and an arbitrary power. It cannot admit of doubt when the Constitution provided for the election of any officer, he secures the right to execute that office from the election, and the commission is only the evidence of this right. One who has no right is commissioned; he exercises the franchise without legal authority. The question is one of judicial investigation—*Wammack v. Halloway*, 33 Ala.; *State v. Siegler*, 1 McCord, 239; *State v. Fulkerson*, 10 Mo. 681.

III. The incumbent was legally elected. So the pleadings admit; but his commission, if he has a right to one, is illegally refused by the Governor. His title to the office is shown by his election; he is therefore no usurper, no intruder. If turned out of office, it must be because the Governor is legally bound to issue him a commission—*Low v. The Governor*, 8 Geo. 365; *Taylor v. Governor*, 1 Ark. 21; *Marbury v. Madison*, 1 Cranch, 50; *Bonner v. Pitts*, 7 Geo. 473; *Stokes v. Kendall*, 12 Pet. 524; *Pacific R.R. v. The Governor*, 23 Mo. 353.

Attorney-General *Wingate*, for plaintiff.

WAGNER, Judge, delivered the opinion of the court.

The information in this case charges that Thomas Adamson, being eligible, was elected sheriff of Lafayette county at the regular election November 6, 1866, and in due time gave bond as required by law, and was commissioned and qualified as such; that James M. Pool, about the 1st day of January, 1867, did, at said county, unlawfully intrude into and usurp said office of sheriff, and is now usurping and holding said office illegally, and prays the issuance of a writ of *quo warranto* directed to said Pool, commanding him to show by what authority or warrant he holds and exercises the office of sheriff of Lafayette county. The return of Pool to the writ denies that Adamson was eligible to the office as stated, or that he was elected as charged, or that he received

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a legal certificate of election, or gave the necessary bond in the time prescribed by law. It then avers that Pool was eligible, having filed and taken the constitutional oath within fifteen days next preceding the election; that he received the highest number of votes cast; that, on counting up the votes by the clerk and two justices, he was duly awarded the certificate; that he gave bond and qualified, &c., and denied that he intruded into or usurped the office. It is not pretended that he was commissioned. The Attorney-General demurs to the answer, because the defendant does not show that he has been commissioned to act as sheriff in and for the county of Lafayette as required by law; because the defendant does not deny the State's allegation that Adamson was regularly commissioned as sheriff as aforesaid; that the facts as set out in the answer do not show that the defendant has any legal or just claim to the office, or any legal authority to perform the duties thereof.

The sole question presented by the pleadings for determination is, whether a person claiming to be elected can legally enter upon the discharge of the duties of the office of sheriff before he receives a commission from the Governor. The 25th section of the 5th article of the present Constitution of this State says that the Governor shall commission all officers not otherwise provided by law; all commissions shall run in the name and by the authority of the State of Missouri, be sealed with the State seal, signed by the Governor, and attested by the Secretary of State.

The statutory law of the State, in its general provisions concerning officers, declares that "all officers elected or appointed by the authority of the laws of this State shall hold their offices until their successors are elected or appointed, commissioned and qualified"—G. S. ch. 16, § 1. But by the law relating to sheriffs and marshals, ch. 25, it is enacted in the 1st sec. that, when any person shall be elected sheriff, the clerk of the county court shall deliver to him a certificate of his election under the seal of the court, and shall also certify that fact to the clerk of the Circuit Court, who shall file the

certificate in his office. Sec. 3 requires every sheriff, within fifteen days after he receives the certificate of his election or appointment, to give bond to the State, with sureties to be approved by the Circuit Court, conditioned for the faithful discharge of his duties. Section 4 provides that if the sheriff fail to give such bond within the time prescribed by law, the office shall be deemed vacant. Sections 5 and 6 make provision for taking the bond before the clerk in vacation, subject to the approval or disapproval of the Circuit Court, and that the bond shall be valid until disapproved. By section 7 it is made the duty of the sheriff, before he enters upon the discharge of his official duties, to cause his certificate of election or appointment, with the oath of office endorsed thereon, to be recorded in the office of the recorder of the county.

The above provisions are identical with the law as it existed previous to the adoption of the Constitution and the revision of 1865. (See "Act in relation to sheriffs and marshals," R. C. 1855, p. 1465.) The whole difficulty arises out of the reenactment by the Legislature of the prior law without reference to the constitutional provision requiring officers to be commissioned by the executive. Under the old Constitution there was no such provision as that embodied in the new one as to officers being commissioned under the great seal. It is true there is no direct means pointed out by which the Governor is to be informed of the election of sheriff so as to enable him to execute the commission; and this is obviously a *casus omissus*, and leaves to him the responsibility of acting on such evidence as he may deem satisfactory. It is within the competency of the Legislature to declare what requisites shall be sufficient to clothe the officer with authority, and induct him into office, without the necessity of a commission; but until an act is passed for that purpose the constitutional injunction seems to be imperative. The law, as it stood anterior to the new Constitution, provides a method by which a sheriff was inducted into office by a compliance with certain acts; the reenactment of that law

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does not dispense with the superadded evidence required by that instrument. And such would appear to have been the interpretation of the Legislature when they enacted that "all officers elected or appointed by authority of law shall hold their offices until their successors are elected or appointed, commissioned and qualified." Requiring a commission in every instance may be productive of inconvenience ; but the Legislature must be looked to to furnish the remedy, not the courts.

The officer does not derive his title to the office from his commission, but by virtue of his election ; and the commission is merely evidence of title disputable in its nature, and subject to be overthrown in a legal contest. When the commission is granted to the wrong person, the courts of the country are open to any one aggrieved thereby for redress.

The demurrer will be sustained.

The other judges concur.

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STATE OF MISSOURI *ex rel.* WILLIAM HIXON, Relator, *v.* JESSE SCHOFIELD, NINIAN W. LETTON, and WILLIAM S. THOMAS, Justices of Lafayette County Court, Respondents.

*Mandamus—Practice—Officer—Clerk.*—The object of a mandamus is to compel the performance of an act. Under the provisions of G. S. 1865, ch. 34, § 18, it is the duty of the court to prefer charges against the clerk if he has been guilty of misdemeanor in office, and it may in the meantime suspend him from office ; and if it neglect this duty, a mandamus may be awarded to compel its performance. A return to the charges preferred should state the time, to show that the charges were preferred before application was made for the writ.

*Application for Mandamus to Lafayette County Court.*

*Knox & Smith*, for relator.

*Glover & Shepley*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The relator was suspended from the office of clerk of the

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County Court of Lafayette county by order of the County Court, and he prays for a mandamus to compel the said County Court to file charges against him with the Attorney-General, that he may have a trial according to law. The answer, among other things, states that the defendants have filed the charges with the Attorney-General, but at what time they were made out and placed in his hands is not alleged.

The relator's counsel demurs to the return, because it is not therein stated that the charges were referred to the Attorney-General before the alternative writ was issued from this court.

We cannot give judgment on the demurrer, and award a peremptory mandamus. The object of a peremptory mandamus is to compel the performance of an act; and if the act has already been done, the writ would be fruitless.

It is admitted that the charges have been made and referred to the proper officer, but the answer omits to state the time. If they were not prepared and forwarded till after the writ was originally sued out, the relator was pursuing his legal remedy; if they were made and referred before the issuance of the writ, he was not entitled to it, and should pay the costs. The answer on this point is evasive, and we overrule the demurrer and deny the mandamus, but order the defendants to pay the costs.

The other judges concur.

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STATE OF MISSOURI *ex rel.* WILLIAM HIXON, Relator, *v.* JESSE SCHOFIELD, N. W. LETTON, and WILLIAM S. THOMAS, Justices of Lafayette County Court, Defendants.

1. *Officers—Clerks—Practice.*—When a clerk of a court is suspended from office under the provisions of the statute, G. S. 1865, ch. 24, § 18, upon charges preferred of misdemeanor in office, no appeal lies from the action of the judges. Sec. 8 of the act of February 1, 1867, is inoperative to give such right of appeal.
2. *Constitution—Statutes—Construction—Evidence.*—By the Constitution, Art. IV., § 32, such portions of a law enacted by the General Assembly as

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are not expressed in the title of the act are void. The title of the act of February 1, 1867, provides for appeals in contested election cases; the subject of sec. 8 of said act giving the right of appeal in all other civil cases is not expressed in the title, and is therefore inoperative, except in cases of contested elections.

*Petition for Mandamus to Lafayette County Court.*

*Knox & Smith*, for relator.

*Glover & Shepley*, for defendants.

WAGNER, Judge, delivered the opinion of the court.

The relator asks for a mandamus from this court against the justices of the County Court of Lafayette county to compel them to grant him an appeal. It appears from the record that the relator was clerk of the County Court in the county of Lafayette, and that charges of misconduct and misdemeanor in office were filed against him; whereupon the County Court suspended him from office, and appointed another person to temporarily discharge the duties of the office till a trial could be had on the charges according to the provisions of the statute. From this order of suspension, the relator made an application for an appeal, which the court refused to grant.

By law, when a court, or a majority of the judges thereof in vacation, shall believe of their own knowledge, or from the information of others on oath or affirmation, that the clerk of such court has been guilty of misdemeanor in office, it is made the duty of the court, or the majority of the judges, to give notice to the Attorney-General, stating the charges, and requiring him to prosecute the same; and they are at liberty to suspend such clerk from office till a trial can be had. The law then indicates the method and manner in which the prosecution shall be carried on by the Attorney-General, and the tribunal in which the matter shall be pursued. This is a special proceeding, applicable to a particular case or state of facts, and must be pursued according to the provisions of the statute. There is nothing in the law by which the party

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accused can avoid the statutory process, and resort to another remedy and a different jurisdiction.

It is claimed that the appeal is authorized under a recent act passed by the Legislature entitled "An act to provide for appeals in contested election cases," approved February 1st, 1867. That act provides that appeals may be taken upon such terms and conditions, so far as the same may be applicable, in the same manner as appeals from justices of the peace; but this is not a case of contested election, and the law therefore can have no application. The eighth section, which undertakes to give the right of appeal, and all other civil cases, must be regarded as wholly nugatory and inoperative. The thirty-second section of the fourth article of the Constitution declares that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed."

The only subject embraced or expressed in the title is to provide for appeals in contested election cases; it can then only be valid so far as pertains to appeals arising out of such cases, and the section which attempts to give the right of appeal in all other civil cases is void and of no effect. There being no law giving an appeal in a case like the one here presented, the County Court rightfully refused the application.

The mandamus is denied. The other judges concur.

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STATE OF MISSOURI *ex rel.* THE ATTORNEY-GENERAL, Plaintiff,  
v. CADWALADER B. CHURCHILL, Defendant.

*Elections—Officer—Bond.*—The provisions of the statute, G. S. 1865, ch. 38, § 5, requiring the county treasurer to give bond within ten days after his appointment or election, are merely directory. Time is not essential to the delivery of the bond; and if the County Court accept and approve the bond, it cannot at a subsequent date set aside its proceedings, annul the commission, and declare the office vacant.

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*Information in the nature of Quo Warranto.*

Attorney-General, for plaintiff.

There is but one question involved in this case, which is : Has a person elected to the office of treasurer of a county to give bond as such within ten days after the election, or within ten days after it has been ascertained that he has been elected by a count of the votes and certificate of the proper officer ?

It is maintained on the part of the State that the bond should be given within ten days after a count of the vote, if it is thereby ascertained that the party has been elected as evidenced by the proper certificate—G. S. ch. 38, p. 226, & ch. 2, p. 63.

*Glover & Shepley*, and *H. C. Young*, for defendant.

I. It is insisted that, on the showing of the relator, no case is made out. The right to this writ lies in the discretion of the court—*Eustace v. Tuthill*, 2 J. R. 184 ; *The People v. Loomis*, 8 Wend. 398 ; *The People v. Phelps*, 1 Denio, 388.

II. There is no case made out by the plaintiff. The fact appears in the record that an election was held November 6, 1866, when Norman was elected county treasurer, and that he gave no bond till the 20th of the same month, fourteen days after his election ; the said Norman, consequently, had no right to the office—R. C. 1865, p. 226, § 5. The court must therefore adjudge that the defendant is lawfully in office under appointment from the County Court—R. C. 1865, p. 226, § 4.

HOLMES, Judge, delivered the opinion of the court.

This is an *ex officio* information in the nature of *quo warranto*. The defendant, having been duly summoned, makes default, and the cause is submitted as upon a petition confessed.

It is stated that Jasper N. Norman was duly elected treasurer of the County of Laclede at the election in November,

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1866, received his certificate of election, gave his bond, which was approved by the County Court and ordered to be filed, and took the oaths required by law, which were enclosed in his certificate or commission; but that a few days afterwards, on motion of the county attorney, the County Court made an order rescinding the approval of the bond, and declaring it annulled, for the reason that it had not been offered and filed within ten days after the election, as required by the statute—G. S. 1865, ch. 38, § 5. The court also declared the office vacant and proceeded to appoint the defendant county treasurer, who gave the required bond, was duly qualified, and entered upon the duties of the office.

We think the court erred in this proceeding. The bond was not void, nor voidable, merely because not presented and filed within the ten days. This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition precedent to the party's title to the office. The time not being of the essence of the thing required to be done here, it was not material—*Rex v. Lexdule*, 1 Burr. 497; *Sedgw. Stat. & Const. Law*, 368-74. When a sheriff was required to give bond within twenty days after his election, it has been held that the statute as to the time of giving the bond was directory merely, and that the failure to give the bond within that time did not forfeit his title to the office—*People v. Holly*, 12 Wend. 481. We are of the opinion that the orders of the court vacating the bond, declaring the office vacant, and appointing the defendant treasurer, should be regarded as having been done without authority of law and as mere nullities. The treasurer elect, having complied with all the provisions of the statute and received his commission, was entitled to hold the office.

The defendant not appearing to have been guilty of any intentional wrong, no fine will be imposed. Judgment of ouster and costs will be entered.

The other judges concur.

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STATE OF MISSOURI *ex rel.* JOSEPH WEST *et als.*, Petitioners,  
*v.* THE JUSTICES OF THE COUNTY COURT OF CLARK COUNTY  
*et als.*, Defendants.

1. *Counties—Removal of County Seats—Elections.*—The statute of 1865 (G. S. 1865, ch. 36) repealed the provisions of the statute of 1855 (R. C. 1855, p. 515) in relation to the removal of the seats of justice in the counties. The action of the County Court upon the petition filed for the removal of the county seat must be had under the law in force at the time the court acts. Under the law of 1865, two-thirds of the legally registered voters must vote for the removal to authorize the County Court to remove the seat of justice.
2. *Courts—Jurisdiction—Agency.*—In the removal of the public buildings of a county, the County Court acts in an administrative capacity as agent of the county; and all persons dealing with it while thus acting are bound to know the law conferring the authority, and must see that it is followed.
3. *Prohibition—Courts—Jurisdiction—Process.*—The writ of prohibition is issued to inferior courts to prevent the wrongful assumption or excess of jurisdiction. It will not lie to restrain the performance of ministerial acts, such as collecting taxes, locating county seats, and the like. The County Courts, in locating or removing county seats, act in an administrative and not in a judicial capacity, and the Supreme Court will not issue the writ of prohibition to restrain their action however mistaken it be.

*Suggestion for writ of Prohibition.*

*Dryden*, for petitioners.

From and after the taking effect of the new Constitution on the 4th July, 1865, a county seat could not be removed except on the vote of two-thirds of the voters of the county having the qualifications prescribed by sec. 3, art. 2, of Constitution—G. S. 24. The 3d sec., art. 11, of Constitution (G. S. 42) repeals all statutes inconsistent with the provisions of said Constitution. The 12th sec. of act of 1855 concerning removals of seats of justice, which prescribes the qualifications of voters, and the 14th section of the same act, which fixes the majority by which the question shall be determined, are inconsistent with the provisions of the 30th sec. of the 4th art. of the Constitution, which provides as well a different qualification of voters as a different majority. (For act of 1855, see R. C. 1855, p. 515.)

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*J. G. Blair and D. A. Day*, for defendants.

The writ of prohibition can only issue in cases of want of jurisdiction, encroachment of jurisdiction, or conflict of jurisdiction by inferior courts—3 Black, Com. 112, 113; 6 Bac. Abr. 581-7; 2 Inst. 607; 9 S. & M. (Miss.) 623; 3 Bulst. 49; 2 Sell. Prac. 312; 2 Ired. 183; 1 Hill, 195; 2 Hill, 367.

If the inferior court have jurisdiction in whole or in part, the writ will not issue after judgment; nor will it issue where the proceedings are simply defective or erroneous—2 Sell. Prac. 312; 2 D. & E. 473; Cowp. 424; 9 S. & M. (Miss.) 623; 2 Metc. 296; 7 Wend. 518; 5 Pike (Ark.) 23; 2 Hill, 363; 8 Bac. Abr. (Bouv.) 218; Burr. 2036; Doug. 378. Nor will it issue unless the proceedings are actually depending in the inferior court and the relators actually endangered from some act to be done in the future. It cannot and will not issue to restrain or prohibit it from doing a past act; its office is a remedy for future acts. The suggestion does not show any act the court can or is about to commit—2 Sell. Prac. 312; 38 Mo. 297.

It is a judicial writ addressed to a judicial officer alone, and to restrain a judicial and not an administrative or ministerial act—1 Hill, 195; 2 Hill, 367; 2 Ired. 183.

If it be contended that the court had the power to make the order of removal, then it is submitted that its power as a court then became exhausted, and it became *functus officio*; and there was by law no act that the justices, as a court, could further do in the premises, and no writ would lie—2 Hill, 14.

We submit, however, that the seat of justice became located by operation of law upon the casting up and arranging of the votes, and that the order of the court was unnecessary and is a nullity, and in nowise affected or endangered the relators, and hence is not the subject of prohibition—R. C. 1855, § 14, p. 516.

As the writ will not lie to restrain or prohibit anything but a judicial act, we hold that defendants Bartlett and Jack-

son are improperly joined in the suggestion—1 Hill, 195; 2 Hill, 367; 2 Ired. 183; 9 S. & M. (Miss.) 623.

The County Court unquestionably acquired jurisdiction of the subject matter when the petition was filed, and the appointment of commissioners under the statute of 1855 was regular and right; and the location of the seat of justice under said law, and the taking of conveyances to the county for lands donated, and the examination of titles by the circuit judge, and his certifying the same to the County Court, and its order for an election, all of necessity had to conform to the law of 1855—G. S. 1865, § 7, p. 76; id. § 3, p. 883.

The only point of real difficulty then is as to whether the 3d section of the 2d article of the new Constitution repealed the law of 1855 with reference to removal of seats of justice. We hold that it did not, for the following reason: because this law of 1855 is not inconsistent with the Constitution—Const. § 3, art. 11, G. S. 1865, p. 42.

Upon this point we submit, 1st, that under the law of 1855 land-tax paying and householding inhabitants could vote, but not all such; 2d, that under the new Constitution they can also vote, but not all such.

By the letter of the law of 1855, § 14, p. 516, all land-tax paying and householding inhabitants were voters—even women, minors, and negroes, if they paid a land tax or were householders, were qualified voters according to the letter of that law; and this could only be prevented by construing the law to mean “land tax payers and householders qualified to vote under the then existing laws of the State.” We submit that the Legislature had the power to increase or diminish the number of voters by restrictions, &c., at any time. What the Legislature might have done the Convention did do, to-wit, reduce the number of imposing restrictions, but still leaving the same class of persons qualified to vote, viz., those who paid tax on land and were householders, and none others.

The only point now to notice is the 30th section, article 4, of new Constitution—G. S. 1865, p. 32. This section pro-

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hibits the Legislature from moving county seats unless two-thirds of the qualified voters vote therefor at a general election. In view of the fact that there has heretofore been two modes of removal, one by that body and one by our courts, a restriction or prohibition of one would not be a restriction or prohibition of the other. Had the Convention entirely prohibited the Legislature from removing, would that have prohibited the courts? This certainly could not be pretended.

The granting of the writ is discretionary with the court—2 Sell. Prac. ; 23 Ala. 94. Where a doubt exists, no writ will issue.

HOLMES, Judge, delivered the opinion of the court.

This is a suggestion accompanied with an exemplification of the record of the County Court of Clark county, filed in this court by the relators, supported by affidavit, and praying for a writ of prohibition against the justices of the County Court of said county, and against the commissioner appointed by the court to select a site for the seat of justice of said county, and the contractor with the court for the erection of county buildings at the place selected, to restrain them from further proceedings in the matter of a removal of the seat of justice of said county, on the ground that the court was exceeding its jurisdiction.

The case is submitted upon demurrer to the petition, from which (together with the exemplification of the records) it appears that a petition signed by some of the citizens of the county had been presented to the County Court in June, 1866, upon which the court, on the 2d day of October, 1866, made an order submitting the question of a removal of the seat of justice to the voters of the county at a general election to be held on the 6th of November following; that a vote was taken accordingly, and, there being a majority of the voters in favor of the removal, the court proceeded to make orders appointing a commissioner, appropriating money, and contracting for the erection of county buildings at

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the place selected ; and that the relators, as citizens of the county and owners of real estate in the town of Cahoka, then the seat of justice, appeared and moved the court to set aside and vacate these orders, and that their motions were overruled.

All these proceedings on the part of the court took place after the general statutes of 1865 went into operation, though the petition had been presented before. The defendants contend that the proceedings were to be governed by the previous statute of 1855. This position cannot be sustained. The statute of 1865 on this subject was in force when the first action of the County Court was had upon the petition. This was a new statute covering the whole of the same subject matter of the previous act, which was thereby suspended and repealed. The former special act providing for a change of the seat of justice from Waterloo to Cahoka had been exhausted by the completion of the removal made under it. The proposition for still another removal fell under the general statutes.

The act of 1865 (G. S. 1865, ch. 36) gave the County Court power to proceed upon a petition of one-fourth of the voters of the county to order the question of a removal of the seat of justice to be submitted to the qualified voters of the county at the next general election, in the manner therein specified, and to appoint five commissioners to select a site for a new seat of justice, if it should appear that "two-thirds of the legally registered voters of the county" were in favor of such removal. The commissioners were to report their proceedings to the Circuit Court, accompanied with the evidences of the title to the land selected for such site, and the judge of that court was to certify his approval of the title to the County Court; and thereupon, if the court should believe that the most suitable place had been selected, it was then to become "the permanent seat of justice of the county."

It is clear that the County Court did not proceed in accordance with the provisions of this act. A majority only,

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and not "two-thirds of the legally registered voters," as expressly required, had voted for the removal. The proceedings were in other respects in direct contravention of the only law which gave them power over the subject. They were acting in an administrative capacity, and as the agents of the county, and were bound to pursue the authority given by the statute, and to act within the scope given by their special and limited power; and all persons dealing with the court, thus acting in behalf of the county, were bound to know the law that conferred the authority—*Wolcott v. Lawrence Co.*, 26 Mo. 272; *Sheeley v. Wiggs et al.*, 32 Mo. 398.

A more difficult question arises whether a prohibition is the proper remedy in such case. The duties of the County Courts are partly judicial, and in part merely administrative—*State v. Cooper Co. Ct.*, 17 Mo. 507. In the exercise of that portion of their jurisdiction which is judicial in its nature, as in matters of probate, accounts, guardians, minors, lunatics, apprentices, and the like, in which an appeal is allowed to the Circuit Courts, the County Courts are a branch of the judiciary of the State, and as much State courts as the Circuit Courts—*Miller v. Iron Co.*, 29 Mo. 122. And if the court were exceeding its proper jurisdiction in matters of this kind, or were proceeding judicially upon a misconstruction of a statute involving a question of jurisdiction in any suit pending between parties (though the county might be one of the parties), there is no doubt that a prohibition might be granted, at the discretion of the court, at the instance of any one of the parties, or even of a stranger to the suit—*Thomas v. Mead*, 36 Mo. 232; *Howard v. Pierce*, 38 Mo. 296; *Gould v. Gapper*, 5 East, 345; *Tylstra v. Charlestown*, 1 Bay, 382; *Washburn v. Phillips*, 2 Metc. 296; *Ex parte Smith*, 23 Ala. 94; *People v. Supervisors*, 1 Hill, 201; *Reese v. Lawless*, 4 Bibb, 394; 2 Litt. Prac. 312.

But the office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial power, and not of ministerial or merely administrative function; and in a case where the court errs on a question of

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jurisdiction, or in the construction of a statute, in the exercise of such judicial power as an inferior court. It will not lie to restrain a ministerial act, as the issuing of an execution, or the levying of a tax to repair county buildings (*Ex parte Branolacht*, 2 Hill, 367; *Clayton v. Heidelberg*, 9 Sm. & M. 623); nor against ministerial officers, such as tax collectors, commissioners to locate a county seat, or the like; nor to restrain the issuing of a commission by the Governor. —*State v. Allen*, 2 Ired. 183; *People v. Supervisors*, 1 Hill, 195; *Ex parte Blackburn*, 5 Ark. 21; *Gill v. Taylor*, 4 McCord, 206. In these cases there is no question of a conflict of jurisdiction between different courts in the administration of justice, and there are supposed to be other adequate remedies for any injury that may be done. In the case of the *King v. Justices of Dorset*, 15 East, 594, the court refused a prohibition to restrain the justices from pulling down an old bridge for the purpose of building a new one, as creating a nuisance, and said that such an application of the writ had not been recognized in modern practice, where there was another remedy by indictment, though some ancient authorities were cited in support of it; and we have found no authority in this country that can be relied on for the application of the writ to a case of this kind. Even where a prohibition might be a proper remedy, the granting of it is subject to the discretion of the court.

In *Tetherow v. Grundy Co. Ct.*, 9 Mo. 117, it was decided that a writ of error would not lie from an order of the County Court appointing commissioners to locate a permanent seat of justice, and it was distinctly intimated as the opinion of the court that such a proceeding was not a *civil suit depending* between parties; that such an order was not a final judgment on which a writ of error would lie; and that the plaintiff was not to be considered a party to the proceeding as a suit; but it was said that "the Circuit Courts have a superintending control over the County Courts, and, if they exceed their powers or act contrary to their duty in proceedings in which writs of error will not lie, there are

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modes by which they can be restrained in conformity to the usages and principles of law." The court did not attempt to point out what those remedies were, nor is it necessary that we should undertake to indicate them now. We may observe only that one mode of exercising that control is by the writ of mandamus in cases where that writ will lie; and if the court should exceed its powers in the exercise of that part of its jurisdiction which is judicial in its nature, a prohibition would unquestionably be a proper remedy.

In respect of the commissioner and contractor. it is apparent from the authorities that this writ must be refused. It is equally clear that the functions of the justices of the County Court in this matter pertain to their administrative capacity, and not to the exercise of judicial power. The statute confers upon them a limited and special authority in proceedings of this nature. They derive their whole power from the statute. It is conferred upon them as representing the people of the county, whose agents they are in this business. The power given is made to depend upon the consent of at least two-thirds of the legally registered voters of the county, and this consent is to be manifested in the mode prescribed by the act, and in no other way. It is not imperative upon the court to adopt the place selected by the commissioners, though the title deeds be approved by the judge of the Circuit Court, unless they believe the most suitable place has been selected; this decision upon this matter, in the exercise of the discretion thus conferred, is to be evidenced by an order entered of record; and then the place so selected becomes the permanent seat of justice of the county. This is a direction as to the exercise of a power given by the statute, and the power must be exercised within the limits of the authority conferred and under the conditions imposed by the act. It is plain that the power given has not been pursued; the conditions have not been complied with; the consent of the voters has not been obtained in the manner prescribed; and it must follow that the pro-

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ceedings were without the authority of law, and are therefore null and void.

A prohibition not being the proper remedy, the demurrer will be sustained and the writ denied. The other judges concur.

STATE *ex rel.* JOHN H. TICE, styling himself School Commissioner of St. Louis County, Petitioner, *v.* THE COUNTY COURT OF ST. LOUIS COUNTY, and WILLIAM H. HEATH, Auditor of said County, Respondents.

*Officer—Schools—School Commissioner of St. Louis County.*—The Revised Statutes of 1865 (G. S. 1865, ch. 46) repealed the statute R. C. 1855, ch. 143, and also the provisions of the statute, Acts 1857, p. 407, relating to the appointment and term of office of School Commissioner for St. Louis county. The ordinance of 1861, abolishing the office of School Commissioner in all the counties except St. Louis, did not make the previous statutes locally applicable only to St. Louis county, so that they were kept in force by the revision of 1865.

*Petition for Mandamus.*

*E. Casselberry*, for petitioner.

The special act of 1857 is an exception out of a general act of 1853, and both of these are yet in force—*St. Louis v. Alexander*, 23 Mo. 509; *Vastine v. Probate Judge*, 38 Mo. 529; § 5, p. 883, G. S. 1865. The act of 1857 is continued in full force by virtue of section 6, p. 883, G. S. 1865.

It may be laid down as a general rule that it is deemed against the policy of the law to favor repeals by implication—*Smith's Com. on Stat.* 879; *Sedgw. on Stat.* 127; 6 W. & Serg. 209; 10 Barr, 442; 21 Pa. 533; *Deters v. Renick*, 37 Mo. 597.

On comparing the general School law of 1855, vol. 2, p. 1430, it will be seen that the powers and duties of the county superintendent of Public Schools is essentially different from the powers and duties of school commissioner in the law of

1855. The powers and duties of these officers are as different as the powers and duties of sheriff and marshal of St. Louis county. As an evidence that the general law of 1865 is not applicable to St. Louis county, it will be seen that the salary is wholly inadequate as far as concerns St. Louis county. The general law of 1865, § 52, p. 268, only allows compensation for sixty days, when the Legislature at the time knew that the whole time of the commissioner for St. Louis during the whole year would be necessary.

*H. A. Clover*, for respondents.

It will be perceived by the court, that by ch. 46, entitled "Of the reorganization, supervision and maintenance of Common Schools," Laws of 1865, p. 255, &c., the Legislature of the State have entirely reconstructed the common school system of the State. There is no longer the office of commissioner of common schools; in lieu thereof is created the office of county superintendent of common schools, whose election by the qualified voters of the several counties is provided for at the general election in the year 1866, and every two years thereafter.

Under the old law of 1855, it was the duty of the commissioner, 1st, to apportion the State, county and township school moneys subject to distribution among the several school districts of his county, according to the number of white children residing in each between the ages of five and twenty years, as shall appear from the last annual reports of the trustees, and also to apportion in the same manner State and county school moneys subject to distribution among the school corporations in his county—2 G. S. p. 1430.

By section 80 of the new law of 1865, this duty is now devolved upon the county clerk—Laws of 1865, p. 27. In the same way the duties devolved upon the commissioner by the second subdivision of § 5, R. C. 1855, p. 1430, are now devolved upon the county clerk. And so on, going through the whole law, it will be seen there is a radical change in the system; the old office is abolished and the new one cre-

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ated. All the duties formerly required of the school commissioner are either devolved upon other officers, or upon the county superintendent.

The Legislature have plainly, directly, and by express enactment, repealed the law of 1855.

FAGG, Judge, delivered the opinion of the court.

The petitioner claims that in pursuance of law he was at the general election held in the month of November, 1864, duly elected by the qualified voters of St. Louis county to the office of school commissioner of said county; that said election, so far as this particular office is concerned, was authorized by an act of the Legislature of this State, approved March 3, 1857; that said act is local and especially applicable to the county of St. Louis, and that by the provisions thereof his term of office was to continue for a period of four years, and until his successor should be duly elected and qualified.

It is farther stated that the petitioner having in all respects complied with the laws of the State regulating the office of the county school commissioner, entered upon the duties of his said office, and has continued to perform the same to the present time; that the compensation to said officer had, in pursuance of law, been fixed by the said court at the sum of fifteen hundred dollars per annum, payable in quarterly instalments; that on the 15th day of March, 1867, one quarter's instalment, amounting to the sum of three hundred and seventy-five dollars, was due the petitioner, and that the same had been demanded of the respondents, and by them refused: wherefore a mandamus is prayed for.

The return of the respondents to the alternative writ admits the truth of all the facts alleged in the petition, except as to the fact of the existence of such an office as county school commissioner for St. Louis county since the first of January, 1867. It is averred that the law of 1857, creating this office, and the act of March 3d, 1857, providing for the manner of filling the same, have both been repealed by the

revision of the general statutes of Missouri of 1865. That the office of county school commissioner is abolished, and the office of county superintendent of Public Schools substituted in its stead, which said office was duly filled by the election of Andrew Murphy by the qualified voters of St. Louis county, at a general election held in the month of November, 1866, in pursuance of the provisions of the statute, &c.

The question involved in this proceeding is presented upon the demurrer to the answer of respondents, and the facts therein stated are therefore to be taken as true. The only inquiry is whether such an office as county school commissioner of St. Louis county has been in existence, in contemplation of law, since the county superintendent of Public Schools for said county entered upon the discharge of his official duties under the act of 1865 in relation to the "reorganization, supervision and maintenance of common schools"—ch. 46, G. S. p. 255.

The office of county school commissioner was created by the provisions of the act of 1853, continued in Art. III., ch. 143, R. C. 1855, of an act entitled "An act to provide for the organization, support and government of common schools in the State of Missouri." This was a general law, and applicable to every county in the State. By its terms the commissioner was in every instance to be appointed by the County Court of the proper county, and his term of office fixed at the period of two years, and until his successor should be appointed and qualified. By the act of 1857, Laws of Mo. 1857, p. 407, the general statute was so far altered in its application to the county of St. Louis, and some others in the State, as to make the office elective, and to change its tenure to a period of four years. The act of 1859, Sess. Acts 1858-9, p. 68, was intended simply to supply an omission in the act of 1857 by providing for the manner of filling vacancies. The Missouri State Convention of 1861 and 1862 (as it is called), by an ordinance adopted October 16, 1861, entitled, "An ordinance providing for abolishing certain offi-

ces," &c., did in terms abolish the office of county school commissioner "in all of the counties of the State, St. Louis county excepted." It is insisted on the part of the relator that the necessary effect of the legislation of 1857, and the ordinance of 1861, was to make the office as to St. Louis county an exception to the general statutes, and therefore local and special in its character, so as to bring it within the class of laws which are embraced in section 6, ch. 224, of the general statutes of Missouri. The ordinance of 1861, after declaring that the office of county school commissioner was abolished in all the counties of the State, with the exception of St. Louis, proceeds in the same section to direct that thereafter "the clerks of the respective County Courts shall discharge all the duties of common school commissioners in their respective counties, except visiting and lecturing in the schools." In point of fact the effect of the ordinance is simply to declare the office vacant, and thereupon to constitute the clerk of the court in each county, except St. Louis, ex officio the school commissioner for his county; so that in effect it differs in no essential particular from the act of 1857. The general school law of 1853, continued in the revision of 1855, is not repealed by either. The act of 1857 simply changes the manner of filling the office as to St. Louis county, and the ordinance of 1861 vacates the office in every county in the State except St. Louis, and at once proceeds to fill the same by designating the person who shall thereafter perform the duties which belong to it.

For the purpose of determining whether the act of 1853, as continued in the revision of 1855, is repealed by ch. 46 of the general statutes, it will not be necessary to examine the provisions of the two acts in detail. The title itself of the act of 1865 indicates that an entire and radical change of the whole machinery of the school law was intended, and that too without any exception as to its application to any county in the State. It cannot in any true sense be said to be the act of 1853 and 1855 continued in the revision of 1865. It substitutes an entirely new system for the organ-

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ization and support of common schools in the State, and therefore must be held to repeal the former statute. That being true, every office created by that act is abolished, and cannot be held to be in existence by the act of 1857, or by the ordinance of the Convention. The act of 1865 creates a new office, with duties attached to it not precisely similar to the office of commissioner, but so nearly the same as to leave no doubt of the fact that it was intended to supply the same place substantially in the new system that was occupied by that office under the old law. Chapter 46, § 48, provides that "there is hereby created the office of county superintendent of Public Schools;" section 49 declares, "there shall be one county superintendent for *every county in the State*, who shall be elected by the qualified voters of the several counties, at the general election in the year eighteen hundred and sixty-six, and every two years thereafter, and shall hold his office for the term of two years, and until his successor is elected and qualified." There is not only no exception made in reference to the county of St. Louis, but the 54th section shows conclusively that it was intended to be embraced within its operation by declaring that "*the county superintendent of St. Louis county* shall have no power or control over that part of the county now under the jurisdiction of the Board of Public Schools."

It may be said briefly that the case of State ex rel. Vastine v. McDonald, 38 Mo. 529, was essentially different from the one at bar. In that case the law creating the office of public administrator had not been repealed by the revision of 1865, but was still continued in force by it.

There was nothing in the act of 1865 so repugnant to the provisions of the former legislation in reference to the selection of that officer to indicate that any change had been intended by the Legislature, and hence the act of 1857 was declared to be still in force.

Peremptory mandamus refused. The other judges concur.

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State ex rel. Kreiter v. Straat.

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STATE OF MISSOURI *ex rel.* WILLIAM KREITER, Respondent, *v.*  
JOHN N. STRAAT, Appellant.

*Constitution — Ordinance — Officer — Circuit Attorneys.* — The Constitution when it went into effect, repealed all ordinances and laws inconsistent therewith. Vacancies in office occurring after the present Constitution went into effect must be filled in the manner pointed out by that instrument; and a vacancy occurring in the office of assistant circuit attorney for the Eighth Judicial Circuit, could not be filled by the appointment of the Governor after a successor was duly elected, commissioned and qualified—State ex rel. Att'y Gen'l v. McAdoo, 36 Mo., 453.

*Appeal from St. Louis Circuit Court.*

Appellant, *pro se.*

I. The vacating ordinance fixes the term of office of the officers mentioned therein.

II. That sec. 6, ch. 18, p. 141, G. S. 1865, is not a law having any force, power or validity whatever so far as this case is concerned.

*Harding & Crane*, for respondent.

First the relator (respondent) admits that, under the opinion of the Judges of the Supreme Court given in response to questions propounded by the Governor, Gantt would have held the office by virtue of his appointment for the remainder of the original term, had he lived; and that if the Governor had filled the vacancy existing on May 1, 1865, by the appointment of any other person, such appointee would have held in like manner. But the relator contends that Mr. Straat was not appointed under the vacating ordinance, and that he was appointed under the provisions of the Constitution, secs. 8 and 26, art. 5, then in force, and under secs. 5, 6, 20 and 21, ch. 18, G. S. pp. 141-2, in effect, at the time of his appointment.

I. The ordinance was confined and applicable to those vacancies only which already existed or were by it created on the 1st day of May, 1865, and that one exercise of the appointing power conferred by it upon the Governor exhausted said power.

II. The Constitution, when it went into effect, superseded the ordinance, and vacancies occurring thereafter must be filled in accordance with the provisions of the former.

The constitutional provisions above referred to contemplated and authorized the action of the Legislature upon the subject, and such action was taken G. S. ch. 18, p. 141.

WAGNER, Judge, delivered the opinion of the court.

The only question in this case is whether the relator or the appellant is entitled to the office of assistant circuit attorney for the Eighth Judicial Circuit, composed of the county of St. Louis. The facts in the case are that in November, 1864, at a regular election held in pursuance of the laws of this State, Walter C. Gantt was elected and commissioned assistant circuit attorney for four years, and being removed from office May 1, 1865, by the vacating ordinance, was re-appointed by the Governor for the residue of the term. Gantt held the office until his death on the 17th of August, 1866, and the appellant was on the 20th of that month appointed and commissioned by the Governor to fill the vacancy. The relator was elected assistant circuit attorney at the general election in November last, and commissioned by the Governor on the 27th of December. The Circuit Court found that the relator was entitled to the office, and gave judgment accordingly.

The contest here seems to grow out of the different views taken of the vacating ordinance. In the opinion given by a majority of this court to the Governor, it was held that the ordinance was so far organic in its character that it could not be repealed, altered or impaired by mere legislative enactment, unless such power was given to the Legislature by some ordinance of the Convention or some constitutional provision; and, as the ordinance authorized and empowered the Governor to fill the vacancies for the residue of the term, we did not conceive there was any clause in the Constitution, so far as circuit attorneys were concerned, permitting the Legislature to disturb the tenure of those incum-

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bents who held under the original apportionment of the Governor.

In the case of the State v. McAdoo we decided that under the Constitution the Governor had not the power to fill by appointment a vacancy in the office of sheriff occurring after the Constitution went into effect, but that such vacancy must be filled in the manner provided by the Constitution. In that case the appointee of the Governor under the ordinance had died, and the vacancy existed after the present Constitution had become the law of the land. The Constitution pointed out the manner in which vacancies in the office of sheriff should be filled, and this, we held, superseded the ordinance. The Legislature has the unquestionable right to regulate the tenure by which the office of circuit attorney shall be held, prescribe its duration, or abolish it entirely; and no person can interpose a valid objection unless he holds by virtue of an appointment under the ordinance. Vacancies occurring subsequent to the taking effect of the existing Constitution must be filled in accordance with the manner prescribed and pointed out in that instrument. It is the paramount law of the land, and supersedes and annuls all ordinances and enactments which are inconsistent with it.

By section 8, article 5, of the Constitution it is provided that when any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall be duly elected or appointed and qualified according to law. When Gantt died, a vacancy existed in the office of assistant circuit attorney, which was to be filled according to the Constitution and the laws made in pursuance of it. The appellant never held his office by appointment under the vacating ordinance, but by appointment made by the Governor under the Constitution and laws of this State.

We are of the opinion, therefore, that the decision of the Circuit Court is correct, and its judgment is affirmed. The other judges concur.

EMORY S. FOSTER, Plaintiff, v. THE STATE OF MISSOURI, Defendant.

*Constitution — Supreme Court — Jurisdiction.* — The General Assembly can confer original jurisdiction upon the Supreme Court only in the cases specified in the Constitution; in all other cases its jurisdiction must be appellate. The act, approved March 11, 1867 (Acts 1867, p. 9), authorizing the Supreme Court to determine both the law and the facts in relation to the amount due Emory S. Foster, the public printer, is void, as it involves no question of constitutional law, and does not show a solemn occasion calling upon the court to give its judicial opinion to the Executive or either branch of the General Assembly.

*Submission on Agreed Case.*

W. H. Blodgett, for plaintiff.

Attorney-General, for defendant.

WAGNER, Judge, delivered the opinion of the court.

Emory S. Foster, the public printer for the State, presented his account for allowance to the State Auditor for certain work done by him in the way of printing journals, laws, &c., and, the fund appropriated for the payment of such claims being exhausted, the Auditor issued to him a certificate of indebtedness for the amount. The Legislature, in passing a bill to meet and pay off certain deficiencies, refused to allow the whole amount embraced in the certificate, assuming that the law had been misconstrued, so as to make the account call for more work than was actually done, and the certificate included a larger sum than was really due. To settle the controversy, and give a construction to the law, the Legislature passed an act, approved March 11, 1867, providing that the Attorney-General, upon the part of the State, should submit to this court an agreed case or cases between the State and the public printer, and certain other officers named in the act, and making it the duty of this court to examine all questions of law or fact growing out of the demand in dispute, and whatever sum should be found due

should be certified by the clerk to the Auditor, who was authorized to draw a warrant thereon.

In accordance with the above act, this case is submitted on an agreed statement. A strange misapprehension seems to have existed in regard to the jurisdiction of this court. Here is an attempt to devolve on the court original jurisdiction in a matter which is the subject of ordinary litigation—a contention between parties for an amount of money. The second section of the sixth article of the Constitution declares that the Supreme Court, except in cases otherwise directed by the Constitution, shall have appellate jurisdiction only. The only case where original jurisdiction is conferred is in the grant of power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other remedial writs. This provision of the Constitution is not only eminently wise, but it is necessary for the protection of the court. Admit the power, and there would be nothing to prevent the Legislature at any time from passing a law to authorize parties throughout the State to make an agreed case and require an adjudication at our hands, and thus make this tribunal the court of first as well as last resort.

It is no answer in this case to say that no provision is made for bringing actions against the State. There is no objection that we know of against passing a law for a submission as attempted here, but the submission must be made to a court of original jurisdiction; and if the parties are not satisfied with the judgment of that court, an appeal may be provided for. It is true, the Constitution says "the judges of the Supreme Court shall give their opinion upon important questions of Constitutional law, and upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives." Of course, no one will contend that any question of constitutional law is involved; and it cannot be called a solemn occasion, as it is simply a contest about a private claim such as transpires in our courts of justice daily.

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We are of the opinion that the act is unconstitutional and void, that it imposes no duty upon this court, and that we are expressly prohibited by the Constitution from taking cognizance of the subject matter. We therefore decline assuming any jurisdiction over the case, and accordingly order it to be dismissed.

Judge Holmes concurs ; Judge Fagg not sitting.

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FRANCIS P. BLAIR, Plaintiff in Error, v. STEPHEN RIDGELY  
and JOHN S. THOMPSON, Defendants in Error.

1. *Constitution—State—United States—Sovereignty.*—The States, when they entered the Union, retained all their original power and sovereignty, except so much as they expressly surrendered to the Federal Government, or they were expressly prohibited from exercising: subject to these exceptions, they are independent commonwealths, and are the exclusive judges of what is just and proper for their own safety, welfare and happiness. Prior to the adoption of the Federal Constitution the respective States possessed unlimited and unrestricted sovereignty, and retained the same ever afterward, except so far as they granted certain powers to the General Government, or prohibited themselves from doing certain acts. Every State reserved to itself the exclusive right of regulating its own internal government and police.
2. *Constitution—Republican Government—State—Missouri.*—The admission of Missouri into the Union as one of the States was a direct and positive declaration by Congress that the government created by its Constitution was republican in form, and that its Constitution was not inconsistent with that of the United States.
3. *Government—People—Constitution—Elections—Voters.*—In common language, when we speak of the people, we mean all the inhabitants of a State; but this is not so when we speak of the people in a political sense. In speaking of the people as a body politic, we speak only of that portion of the inhabitants who are entrusted with the political power. *The people*, for political purposes, must be synonymous with qualified voters. If the power to regulate the internal government and police of a State reside in the people, then it is their peculiar and exclusive province to say and determine what shall constitute any inhabitant a qualified voter. Upon the exercise of this power by the people of a State there is no restriction or restraint imposed by the Constitution of the United States, for there is not to be found in that instrument a single sentence, paragraph, or word, which gives the National Government power over the qualifications of voters in any of the States; and the direct opposite is affirmed in the article provid-

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ing that "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively or to the people."

4. *Elective Franchise—Voters—Constitution.*—Outside of society, and disconnected with political society, no person has or can exercise the elective franchise as a natural right, and he only receives it upon entering into the social compact subject to such qualifications as may be prescribed by the State or body politic. The State of Missouri having sovereign power to regulate its own internal government, and to prescribe the qualifications which shall authorize any inhabitant to exercise the elective franchise therein, the oath prescribed in Art. II., §§ 2 & 6, of the Constitution as one of the qualifications for voting does not violate any of the provisions of the Constitution of the United States.

*Error to St. Louis Circuit Court.*

*S. T. Glover*, for plaintiff in error.\*

The general proposition which I shall endeavor to establish is, that the supposed constitutional provisions relied on by the defendants to support their demurrer are no constitutional provisions at all; that they are binding on nobody and affect nobody's rights; that they are in violation of the Constitution of the United States, and mere nullities.

The plaintiff will contend (1) that sec. 3 of art. 2 is a bill of attainder, in the meaning of the Constitution of the United States (art. 1, § 10); and being null and void, for that reason all other sections in aid of it are also null and void. Attainder is a legal term which we derive from the English common law. From the same source we learn there were two sorts of attainder—1. Attainder by judicial conviction in the ordinary course of law; 2. Attainder by bill, that is, by legislative or parliamentary enactment. Now, if we can clearly ascertain what judicial attainder is, it will assist us in identifying the qualities of an attainder by bill. All the criminal law writers assert that attainder means literally a staining. And inasmuch as one convicted of a capital offence at common law was thereby deprived of all credit, reputation and right as a citizen and a man, he was by that law considered stained or blackened in his name and character. The word employed in the law Latin to express this staining or blackening was *attinctus*, and hence the word "attainder."

"This attainder (says Stephens, 4 Com. 446) is the stain

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\* On account of the permanent interest of the principles considered and decided in this case, the arguments of counsel are given very much at length.

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or corruption of the blood of a criminal capitally condemned. He is no longer of any credit or reputation ; he cannot be a witness in any court, neither is he capable of performing the functions of another man." Another consequence of the attainder at the common law was forfeiture and corruption of blood of the convict, so that he could neither inherit lands nor other hereditaments from his ancestors, nor retain those he was already in possession of, nor transmit them by descent to any heir"—1 Tom. Jac. Law Dic. 163. So we perceive it was not conviction which constituted attainder, but it was the disabilities, disqualifications and disfranchisements annexed to the conviction. The conviction was one thing, the attainder another. A man may be tried judicially and condemned as a felon, but he is not attainted unless, as at common law, these disabilities, or some of them, are inseparably annexed to his conviction. It is perfectly in the power of the Legislature to limit the extent of the attainder, or to take it entirely away, leaving the conviction in full force. The British Parliament, in 1798, passed an act so far limiting the force of attainder within the realm as to declare that "no attainder should work corruption of blood or forfeiture longer than the life of the convict."

The same limit has been fixed by the Constitution of the United States, and many, if not all, our State Constitutions, and by the course of American legislation the extent of a judicial attainder is often made to vary according to the crime to which it is annexed.

In Missouri, the disabilities which constitute the judicial attainder on conviction of crime are as follows: Disqualification to serve as juror in any case; to vote at any election; to hold any office of honor, profit or trust; to be sworn as a witness in any cause, or to practise as an attorney or counsellor at law within the State—R. C. 1855, p. 557, § 13; p. 568, § 46; p. 586, § 70; p. 608, § 47; p. 635, § 56; pp. 278-9, §§ 6 & 11.

The court will observe that under some of these statutes the convict is so far deprived of his credit and honor, and stained in his reputation as a citizen, that he is by conviction denied the right to vote at an election or hold an office; that by others he is prohibited, after conviction, to sit as a juror in any court, and by others he is so completely attainted as to be declared infamous as a man as well as a citizen, unworthy to be sworn as a witness because deemed incapable of speaking the truth.

In every one of these statutes the attainder is annexed to the offence of the convict as part of his punishment as distinctly as the other penalties of the criminal code, whether it be fine, forfeiture, imprisonment, or death; and a pardon by the Governor of the offence removes the disabilities just as it does the other punishments of the offender—R. C. 1855, p. 643, § 26. Having ascertained the nature of a judicial attainder, we are prepared for the consideration of attainder by bill.

The Constitution of the United States declares (art. 1, sec. 10) "no State shall pass \* \* \* any bill of attainder," leaving judicial attainder still in the hands of the courts.

This is more evident from another clause in the Constitution of the United States—art 3, § 3: "No attainder of treason shall work corruption of blood, or forfeiture of estate, except during the life of the person attainted." This section can only allude to judicial attainder, since bills of attainder are prohibited.

What is a bill of attainder? It is fair to conclude that it is an infliction by a bill, by legislative or convention ordinance, of the same disqualifications and disabilities, or some of them, which constitute judicial attainder. In other words, it is an attempt to attain one or more persons by a legislative act, contrary to the ordinary course of judicial proceedings, to the same effect that such persons might be attainted judicially. Whether an attainder be inflicted by the judgment of a court, or by an act of a legislative body, it is the same. The difference between judicial attainder and attainder by bill consists only in the hand that inflicts it. If the fastening upon the citizen the disability to vote, to hold office, or to sit on a jury, for some act of his, be attainder when inflicted in the ordinary course of judicial proceedings, the same disabilities must certainly be an attainder when for some act of his they are inflicted by a bill.

And so Judge Story supposes when he says, "Bills of attainder, as they are technically called, are such special acts of the Legislature as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason or felony, without any conviction in the ordinary course of judicial proceedings; \* \* \* if an act inflict a milder punishment than death, it is called a bill of pains and penalties. But in the sense of the Constitution it seems that bills of attainder include bills of pains and penalties"—3 Sto. Com. 209, § 1338. The meaning of which is that a mere

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bill of pains and penalties is prohibited by the Constitution. To constitute a bill of attainder it is not essential that every possible penalty or disability be inflicted, and every possible stain and dishonor be imposed. If any penalty or disability, or any stain or dishonor, be imposed on the person by bill, and for an offence either before or after the fact, and by means contrary to the ordinary course of judicial proceedings, that will constitute a bill of attainder. The remarks of the Supreme Court of Kentucky, 1 Dana, 510, may be well quoted here: "Bills of attainder have generally designated their victims by name; but they may do it also by classes, or by general description fitting a multitude of persons. Either mode is equally liable to moral and constitutional censure. They have generally been applied to punish offences already committed, or for criminal omissions thereafter incurring. A bill of attainder is not necessarily an *ex post facto* law. A British act of Parliament might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed and treated as convicted felons and traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury."

According to the Supreme Court of Kentucky, if the Legislature should pass a law declaring that all that class of persons who by a day named had failed to file an affidavit that they had kept the Sabbath laws, or the revenue laws, should be deprived of suffrage, this would be a bill of attainder. The bill would wear the form of a general law, but would be in fact a special act applying only to those who could not take the oath. It would no more be a general law than an act which should declare that every person who by a day named has not filed an affidavit that he never answered to the name of John Smith, shall suffer death as a traitor. Such an act would apply only to John Smith, notwithstanding its form. It would be a special act inflicting death on John Smith; that is, it would be a legislative judgment, and nothing else.

In *Fletcher v. Peck*, 6 Cranch, 87, Marshall held an act repealing a law granting a title was an attainder and *ex post facto* law, forfeiting estate without a crime.

Let us again consider the force of Story's definition:

"Bills of attainder are such special acts of the Legislature as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason or felony, without any conviction in the ordinary course of judicial proceed-

ings. If it inflict a milder punishment than death, it is called a bill of pains and penalties."

In inquiring whether the sections above stated are literally and substantially within Story's definition of an attainder, three points only need be attended to.

I. Do they suppose the persons aimed at to have been guilty of any high offence, such as treason or felony?

II. Do they inflict punishment on these persons?

III. If so, do they inflict that punishment without any conviction in the ordinary course of judicial proceedings?

As to the *first point*:—The answer to this is written down in the plainest terms on the face of sec. 3: "At any election held by the people under this Constitution, &c., no person shall be deemed a qualified voter who has ever been in armed hostility to the United States, or to the lawful authorities thereof, or to the Government of this State," &c. There is the act of levying war—the very definition of treason. The person excluded from suffrage is excluded for this treason. Of course, he is supposed to be guilty of the treason.

As to the *second point*:—All who have attempted to maintain the constitutional validity of these sections, deny that they are penal. It becomes necessary, therefore, to enter upon argument to prove a proposition which a little candor would promptly concede. "Punishments are either corporal or not corporal; punishments not corporal are fines, forfeitures, suspension or deprivation of some political or civil right"—Bouv. Law Dic. 389. When the Convention inserted in the Constitution that no person should vote who had committed treason, it would seem to admit of no doubt that the liberty to vote was taken away because of the treason; and that the disfranchisement of the person was a penalty, forfeiture or disability, or shame and dishonor inflicted for that act of treason. If this is not so, one can scarcely imagine how a punishment could be inflicted for such an act.

Suppose the Constitution had said, no person shall be deemed a qualified property holder who has committed treason; or, no person shall be qualified to live in this State who has committed treason; or, that every such person shall be seized and put to death without any conviction in the ordinary course of judicial proceedings;—these objectors might as well contend the confiscation, the banishment, or the death, was no punishment inflicted on the act; for neither death nor banishment is a penalty so frequently inflicted on crime as disfranchisement. The objectors say it would be

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absurd for the Convention to undertake to convict particular persons of crime by means of their own devising without a trial by jury, and so to punish them, and therefore the Convention have not done it. Again, it is insisted that the Convention nowhere say that they are punishing anybody, and therefore it must not be concluded that they did punish. It is impossible so large a distinction can be made to rest upon grounds so small. The whole of it consists in the use or omission of a few words. The omission of these, it is supposed, changes the nature of the whole case, and renders useless the constitutional prohibitions.

Let it be remarked that the 3d section says as much as any penal law needs to say. It declares positively that disfranchisement is annexed to the act. Penal statutes are sometimes so framed as to use the word "punish" or "punishment"; but this is not always the case, nor is it ever essential. Turn to R. C. Mo. 555, and read: "Every person who shall commit treason against this State by levying war against the same, or by adhering to the enemies thereof by giving them aid and comfort, shall, upon conviction, suffer death," &c. No one has ever imagined the word "punish" or "punishment" was necessary to make this a penal law. The language of sec. 3 is quite as plain. No one who has committed treason shall vote. Whoever has committed treason is for that cause deprived of the liberty of suffrage. But our objectors insist that, in order to make the provision penal, it should read thus: Whoever has committed treason, &c., is hereby punished by the loss of his suffrage.

Proceeding, however, to show that black is not white, I refer the court to several adjudications on this most important objection. A statute declared that any one who crossed the lake within three miles of a certain bridge should pay toll to the bridge company, and Savage, C. J., held it was in restraint of liberty and penal—2 Cow. 419. So statutes creating liabilities to forfeiture are penal—1 Paine, 32-3; 4 Mass. 473; 2 Sto. 203; 9 Shep. 541; 8 Porter, 563; 3 Hill, (S. C.) 96; 12 N. H. 255. An act requiring a party to stipulate on oath in relation to his past conduct, and the future state of his mind, was held highly penal—1 Munf. 482.—"That disqualification from office, or the pursuit of a lawful avocation, is a punishment, is too evident to require any illustration"—7 Porter, 366. H held an office during good behavior, and, by an act of Legislature, B was elected to the same office, the act virtually removing H, but without any

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legal cause of ouster. The Supreme Court of North Carolina annulled the act, and said, "to inflict punishment after finding a default is to adjudge; but to do it without default is still more indefensible. What more can a citizen suffer than to be taken, imprisoned, disseized of his freehold, liberties or privileges, exiled, destroyed, deprived of his property or life, without a crime?" "Yet all these he may suffer if an act of the Legislature denouncing these penalties on particular persons, or a particular class of persons, is a law of the land"—4 Dev. 1. The Supreme Court of North Carolina reasoned very soundly when they concluded that to inflict a penalty, forfeiture, or disfranchisement, upon a citizen, without a crime and without intending to punish him, was less defensible than if crime was pretended and the intent to punish openly avowed. (In 6 Cranch, 87, Ch. J. Marshall decided that a statute annulling a law under which a title had vested was penal; that it punished for a crime not declared by previous law, and it punished without a crime.)

The Legislature of Kentucky, in 1824, passed an act that if certain persons did not improve their lands by a day named in a certain mode, the lands would be forfeited to the State. This law prescribed no punishment in terms, but took away the right of the citizen for the act of omission. The statute was held penal and declared to be a bill of pains and penalties, and void—1 Dana, 209-10. Would this law have been any more constitutional, or any less penal, had it declared that all persons who had heretofore suffered their lands to lie unimproved shall be disqualified to hold said lands, or to vote at any election in the State of Kentucky?

The objection may be fairly stated thus: If the statute had said, every person who does not file his affidavit in sixty days from the passage of this law that he had theretofore made certain improvements on his lands, is hereby punished by deprivation of his liberty of suffrage, the provision would have been a violation of the Constitution of the United States; but if it says merely that in such case the person shall not vote, the provision is not unconstitutional. It is a rule of law that penal statutes must be strictly construed. The act intended to be punished must be plainly defined, and the punishment as plainly annexed to the act. That a given penalty is annexed to the act must not be left in doubt. This is all which the most strict construction demands for the enforcement of any penal law. Smith (Com. 62) says, "It will be at once concluded that no man should be stripped of a valu-

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able property—perhaps his all—be disfranchised, or consigned to public ignominy and reproach, unless it be clear that such high penalties have been annexed to the act he has committed.”

If your honors will look for a moment at the nature of the liberty of suffrage taken away by these sections, you will see that the disability imposed, the dishonor inflicted, could not well be greater. We value life, liberty, and property; and all these are admitted to be secured by constitutional guarantees: but the greatest among our liberties is suffrage. It is suffrage which protects property and life and all our other liberties. Mr. Madison, in 1785, writing to John Brown of Kentucky, urged upon him that the Legislature should not be allowed to abridge the right of suffrage—1 *Mad. Writings*, 178. “It is that right [said Alex. Hamilton] by which we exist as a free people”—3 *Hist. Repub. U. S.* 24. How much of blood and treasure has not been sacrificed to obtain it? When will men who know and appreciate liberty cease to value it above fortune and even life? The Supreme Court of Pennsylvania say: “The most important of all our franchises is the right of an elector and citizen. It is true that, in a confined sense, it cannot be called property—it is not assets to pay debts—nor does it descend to the heir or administrator; but who does not feel its value? And who would not turn pale if he thought he could be deprived of it, without a hearing or trial, by an act of Assembly?” The court speak of the right of an elector as a franchise; but by all authorities, English and American, “liberty” and “franchise” are synonymous terms—4 *Tom. Jac. Law Dic.* 148; 2 *Black.* 21–37. The right of the people to elect officers is a franchise—2 *Bouv. Dic.* 593. In Mr. Webster’s argument, Dartmouth College case (5 *Webster’s Works*, 479–81), he said “liberties and franchises are the same.”

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“It cannot be necessary to say much in refutation of the idea that there cannot be a legal interest or ownership in anything which does not yield a pecuniary benefit, as if the law regarded no rights but rights of money, and visible, tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right to be exercised at his own discretion, and it cannot be taken away from him. Consequences of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was

ever yet heard to contend, however, that for that account the public may take away the right or impair it."

Mr. Madison held that the citizen had not only a right to his property, but a property in all his rights—4 Writings of Madison, 478-80. When, under the English common and statute law, one was made a citizen of London or other city, or free burgess of any town corporate, "he had a freehold in his freedom during life"—2 Tom. Jac. Law Dic. 378. Can it be possible, your honors, that in America the liberty of suffrage is less secure than it is under the rule of Lords and Kings? Is it true that while an acre of land or fifty dollars in money is protected by a jury trial, the liberty of suffrage is not?

The deprivation of the liberty to vote in Missouri is by special statute law (R. C. 1855, p. 645, § 39) a brand of infamy. The learned Beccaria, after conceding that infamy is a punishment frequently inflicted for the commission of crime, adds the following sensible remarks touching its employment: "The punishment of infamy should not be too frequent; for the power of opinion grows weaker by repetition. Nor should it be imposed on a number of persons; for the infamy of many is the infamy of none"—Becc. on Crimes, 86.

As to the *third point*:—Do the sections under consideration inflict the punishment of disfranchisement without any conviction in the ordinary course of judicial proceedings?

Judge Story has put the definition of a bill of pains and penalties even more forcibly when he says, "In such cases the Legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of a trial, satisfying itself with proofs when such proofs are within its reach, whether they are conformable to the rules of evidence or not." Brande (Encyc. 873) calls it a "species of process employed to inflict punishment on State offenders out of the ordinary course of justice." Wooddeson, in an able article (38 Law Lib. 371) has carefully noticed the points in which the bill of attainder or pains and penalties departs from the ordinary course of judicial proceedings. Nothing is more important to the case at bar than the consideration of these points.

Wooddeson, speaking generally of these bills, says:

1. That in all of them the Legislature assumes judicial magistracy, weighing the enormity of the charge, and deciding on the political necessity and moral fitness of the penal judgment.

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2. That they are all of them adapted to exigencies unprovided for in the criminal code.

He then identifies them by classes in the following manner:—

1. Bills that make a material innovation on the crime.
2. Bills that make no innovation on the crime, but change the rules of evidence.
3. Bills passed against domestic rebels and enforced in a summary mode without indictment or trial by jury.
4. Bills which affect the punishment making some innovation or creating some forfeiture or disability not incurred in the ordinary course of law.

Now, may it please the court, a disregard of the ordinary course of justice in any of the above mentioned particulars is enough to stamp upon these sections the character of a bill of pains and penalties. I will show that they embrace them all. I will show that when from each form of attainder which has been enacted in England, the constituent element is extracted, that same element will be found in the case at bar.

*First.* These sections disregard the ordinary course of judicial proceedings in this: they assume "judicial magistracy." The Supreme Court of Ohio has laid down distinction between legislative and judicial power with great clearness (16 Ohio, 623). "The legislative power may enact laws, but the judiciary declares their meaning. The judiciary declares what has been law, and what is law. The courts act on the past and the present; the Legislature on the future. To say that a law may be passed making that criminal then which is lawful now, is unmitigated despotism." Now may it please the court, if this be a true definition, the Convention did assuredly assume judicial magistracy. They did most certainly act on the past, which power belongs to the judiciary. The Convention did more—they undertook to say what was law with respect to facts already past. They assumed to decide that certain disabilities legally attached on such persons as had previously committed certain acts or spoken certain words. Now this was declaring both what the law was at the time they made sec. 3, and what it had been before they made it. Not only did the Convention do this, but they so contrived it that no court was allowed to inquire what the law was at the time the acts were committed, or the words spoken, which they assumed to punish. The Convention decided that by such acts or words the parties

stricken at were disfranchised absolutely, and took away from the case of those persons so much as they, the Convention, deemed it expedient to decide. Let this be made plain. The question is whether the Convention assumed judicial magistracy; whether they finally and judicially decided any portion of the case of the persons stricken at by sec. 3. This will be answered by tracing the practical operation of the plan adopted by the Convention to execute their work. Let us suppose a Christian minister is arraigned for preaching the Gospel without taking the oath required by sec. 9, article 2. He admits the facts charged in the indictment, but relies on the defence that he and some friends did once submit themselves to the authority of the enemy, who made a night attack, but he is unable now conscientiously to swear his submission was under overpowering compulsion. He asks the court to decide that such submission was not then legal cause of disfranchisement. Can the court hear this defence and uphold the 3d and 9th sections? Certainly not. The court must tell the prisoner that the Convention adjudged that question of law, and decided it finally; that the court had been prohibited by the Convention from looking into it. The court is obliged to tell the preacher that the only part of his case untried and unadjudged by the Convention is, whether he preached without taking the oath. Suppose it is a teacher who is on trial. He admits that he taught a school of orphan children for charity and the love of God, and did not file any oath about it; but that it is all a mistake about his doing any wrong acts or speaking any bad words; that the child unborn is not more innocent than he is of every thing in sec. 3; and he calls for proof of his guilt according to the laws of the land in force at the time. The court cannot allow this defence without overturning the sections, because the Convention has decided that no affirmative proof of his guilt is necessary. The Convention has told the court to treat him as positively guilty of all the matters in sec. 3. The Convention have ordered him to prove his innocence by an oath and told the court not to allow any other proof, *pro* or *con*.

The voter appears before the judges of the election. He was in arms in 1861 as a Union soldier against the rebel Government of Missouri, and could not take the oath. He wishes to read the laws of the United States and satisfy the judges his act was patriotic and honorable. But the judges respond to this, they have no right to look at the nature of

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the act then, nor at the laws in force then; that the Convention have solemnly decided that his act was deserving of ignominious disfranchisement, and that the decree of the Convention is proof positive not only that he made war on the rebel Government, but likewise on the United States, and there is no need for any evidence against him.

It appears then that the act of the Convention is nothing less than a mandate to all officers commanding them to hold, in every case that arises, that sec. 3 is conclusive evidence of the disfranchisement of all such persons as fail to prove their innocence, no matter when the acts or words transpired, nor what the law was at the time. But such questions as these belong to the judiciary. But the Convention assumed to decide, and did decide them all. Therefore the Convention then assumed judicial magistracy. The Convention then adjudged an important part of the law of the case of every person who is stricken at by section 3. A case is composed of questions of law and fact. If a Convention could adjudge any of the questions of law belonging to a case, it might adjudge them all. There is no more reason why it should assume to adjudge questions of law than questions of fact. It might as well have adjudged all the facts. And experience has fully shown that such bodies, when they assume to decide one will decide the other, and decide all that are expedient. And it is in the assumption of such arbitrary powers that legislative assemblies have not a few times gone the length of deciding that certain persons by name had committed specified acts when they had not, and that such acts were punishable with death when they were not, and that these special acts or legislative judgments, or bills of attainder, have been sometimes carried out by pusillanimous courts, and sometimes by machinery contrived specially for such cases.

The assumption of judicial magistracy is not allowed to legislative bodies even in civil cases.

In 1835 the Pennsylvania Legislature passed an act to the effect that "every last will and testament theretofore made or thereafter to be made, except such as had been finally adjudged, to which the testator's name had been subscribed by his direction, or to which he had made his mark or cross, should be deemed and taken to be valid." This was held to be a special act or legislative adjudgment made in the assumption of judicial magistracy, and void—11 Pa. 494.

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In 1843 the same Legislature enacted that a certain sheriff's deed should be considered valid; the same ruling was made as in the last case (33 Pa. 406), and the court remarked that "the law which gives character to a case, and by which it is to be decided, is the law that is inherent in the case and constituted part of it, when it arose as a complete transaction." \* \* \* "If this law be changed or annulled, the case is changed and justice denied, and the due course of law violated." \* \* \* "In the very nature of things, a law that is enacted after a case has arisen can be no part of that case. Such a law must produce an untrue decision—a decision not of a case arising between the parties as it ought to be, but a case partly created by the Legislature." And such also was the ruling upon an act which authorized a guardian to sell a minor's lands and pay the ancestor's debt (10 Yerg. 59); an act authorizing a person to sue without letters of administration (5 Yerg. 320); an act creating a special court to try certain causes in a certain way, directed by the act (2 Yerg. 599); an act dismissing certain suits (*id.* 554); an act empowering one to revive a judgment as if he was executor (4 Yerg. 202); an act directing a deposition to be read on a trial (1 Chip. 237); an act prohibiting an injunction (5 Cal. 74); an act removing an officer without cause (1 Dev. 1); an act granting leave to answer after default (4 R. I. 324); an act declaring the meaning of a law (5 Humph. 165); an act taking away an appeal (5 Ark. 358); an act granting a new trial (1 N. H. 199). All these cases were decided with reference to questions of property. Will a less stringent rule apply where the unauthorized assumption of judicial magistracy involves the infliction of disabilities approaching personal infamy?

The Kentucky Legislature passed an act that whenever any white man stated on oath to a justice of the peace a negro had lifted his hand against him, the justice should, without further investigation, order thirty-nine lashes to the negro. The Supreme Court of Kentucky annulled the law, it being a legislative judgment or assumption of judicial magistracy—3 A. K. Marsh, 73. Apply these authorities to the case at the bar. The Convention has directed the judges of election to disfranchise the citizen on sundry charges of treason and *ex post facto* offences, and suffer no one to demand accusation, or notice, or proofs, but to require an oath of innocence. May it please the court, at no time in Missouri since

the existence of the State Government, has any department save the judicial exercised the powers employed by the Convention in these sections.

A few words only remain to be added under this head. That these sections were made in conformity to what their authors deemed political necessity is universally avowed; that they make no legal claims to favor, but rest alone on what is asserted to be a moral fitness, is quite as manifest.

*Second.* These sections disregard the ordinary course of judicial proceedings in this, that they are adapted to exigencies unprovided for in the criminal code. The disfranchisement of a large number of citizens for treason was an object in view. But under the criminal code that could not be effected soon enough to meet the views of the Convention. The criminal code provided for indictments, trials, and convictions. It also permitted pardons from the executive departments, State and Federal, and both these principles of that code were offensive to the Convention, and hence these sections.

The disfranchisement of a still larger number of citizens, who had violated no law, but had displeased the Convention, was an object in view. This class could not be disfranchised by any requirement to file an oath of innocence of crime. The Convention was compelled consequently to describe this class by other designations, which could not be denied under oath, and hence these sections.

A great deal was supposed to be gained by giving to sec. 3 the form of a general provision, while retaining all the force of a special act of condemnation, and hence the form of these sections. It would have been unconstitutional to say that A, B and C are hereby disfranchised for this or that act, for that would be a special law or legislative judgment made for the case of A, B and C. But to declare that all persons are disfranchised who did certain particular acts, only committed by A, B and C, would be a general law. To declare that John Smith is disfranchised for any named cause would be a special act for his case, a mere judgment against John Smith; but to provide that all persons who have ever answered to the name of John Smith within the State are disfranchised for such crime, would be a general law of the land, a rule of action for the people. So the Convention thought, or pretended to think. And this is the mode in which they met the political exigencies not provided for in the criminal code. Had they disfranchised every person who could not swear that he had

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been a member of the Convention, it must have been all right, for the assembled Gods of Olympus never swelled higher nor laid claim to more transcendent powers than those sixty delegates of the people of Missouri.

*Third.* These sections disregard the ordinary course of judicial proceedings in this, they make a material innovation on the crime.

An examination of the analysis of sec. 3 will disclose the fact that among the offences therein mentioned as cause of disfranchisement, not less than thirty-five are offences after the fact created by that section; further, that the penalty of disfranchisement never did attach on any of these acts before its enactment. This species of pains and penalties Mr. Wooddeson has detected in the case of Lord Clarendon, who was disfranchised and banished because he left England while under prosecution, no such act being penal under any law of the realm. It will further appear by sec. 6, art. 5, of the new Constitution, that the power of pardon is taken away from all persons mentioned in sec. 3.

*Fourth.* These sections disregard the ordinary course of judicial proceedings in this, they change the rules of evidence.

1. The law in force at the time all the acts of treason mentioned in sec. 3 are supposed to have been committed, was in these words: "No person can be convicted of treason unless on the testimony of two witnesses to the same overt act"—Cons. R. C. 1855, p. 84, § 15. This clause is omitted in the new Constitution purposely to allow other evidence.

2. The Convention having gotten rid of the two witnesses, decreed the guilt of all persons who would not or could not swear to their innocence.

3. They exclude all evidence, save only the filed affidavit, although such affidavit was no evidence when the supposed treason was committed.

Nothing is plainer than that the ordinary course of judicial proceedings in Missouri, at the time when the offences before or after the fact mentioned in sec. 3 were committed, forbade any person to be put upon his oath as to whether he had committed an offence or not. Prior to the new Constitution criminal justice here was accusatorial in every feature. It had never been otherwise in any State of the Union. But the American jurist, on scanning the short and forcible device for executing the judgment of the 3d section, is shocked to discover a total absence of the accusatorial method, so

well understood and so much loved by free nations, and the substitution of the hated inquisitorial in lieu thereof. Dr. Francis Lieber once was a lawyer and a statesman. In his *Civil Liberty*, vol. 1, p. 87, he says: "Another guarantee of the last importance is the well-secured penal trial, \* \* \* a distinct indictment charging a distinct act, the duty of proving this act on the part of the Government, and not the duty of proving the innocence on the part of the prisoner, \* \* \* the accusatorial and not the inquisitorial process." This is what Dr. Lieber declares to be the right of every person charged with a crime under a free government. The intelligent reader, whether of law or history, will recognize the truth of his declaration. But what securities are provided by these sections? A citizen, whose liberty to vote has been heretofore unquestioned, goes forward on election day and tenders his ballot to the judges; he is informed that there is a question about his liberty of suffrage; that he stands charged with treason and other offences, eighty-six in number. He calls for an indictment, according to the ordinary and long settled course of judicial proceedings in Missouri, and offers to meet it promptly. But he is informed that he has no longer any right to an indictment; that the Convention has rendered it unnecessary. He demands specifications of the charge, with time, place, manner, &c.; but he is told that the Convention has relieved them from the burden of furnishing any. He asks for the proof on which these grave and manifold charges are preferred; but he is given to understand the Convention has done away with all that. He wishes to know who makes these charges; he can obtain no answer. He inquires which one of the eighty-six acts he is supposed to be guilty of. He is then told that there is no accuser, and no need of any; but that the Convention has passed a law which proves that he is guilty of all the specifications in sec. 3, and until he makes and files an affidavit of innocence, touching all acts therein, his case cannot be even considered! Perhaps the citizen, after examining the section, declares he is ready to respond to the inquisition as touching all crimes or breaches of any law; that he is guilty of none, but that he did commit some acts mentioned, innocent at the time, and he wishes to produce the statutes and prove that said acts were not penal at all, or not grounds of disfranchisement. But he is told that all this would be of no use, as the Convention has decided that the acts, however innocent then, are criminal

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now, and that he stands disfranchised by the Convention without the breach of any law! Perhaps the citizen discovers nothing in sec. 3 of which he cannot truly acquit himself under oath, and promptly takes and files the oath and again offers his ballot. But is he now entitled to a vote? Not at all. For the judges inform him that Mr. Scallewag has just testified that some portion of his affidavit is untrue, and his vote is rejected. Here the citizen boldly asserts that Scallewag is a reckless knave, and that he can prove by hosts of witnesses not only that his own affidavit is true, but that Scallewag is unworthy of credit. At this point the judges are compelled to admit that they cannot summon any witnesses—they have no power—that no one has such power—the Convention did not think it necessary!

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It has been asserted by the friends of the Missouri test oath that it has long been in use, and proved itself a deserving instrument of the State for the promotion of criminal justice. I cannot assent to this declaration. That the Spanish Inquisition may have used an oath in something like the manner in which it has been used in Missouri may be true. I will not assert that this is so; for I do not wish to do any injustice to the Spanish Inquisition. That the Protestant ecclesiastics may have acted quite as badly as the Spanish priests is not denied. But I will affirm that Queen Elizabeth's inquisition never went so far as the Missouri Convention. I will affirm, after some research, I have found nothing in the laws of England or America to justify the assertion that such a device ever entered before into the mind of any English or American law-giver. Oaths have been common in all that history; oaths of pledge or promise to abjure or support sovereignties, reigning families of princes, religious or political dogmas, to observe or perform official duties, &c. But a test oath to ascertain if a party had been guilty of crimes made before or after the fact, some eighty-six in number, is what, I affirm, I have seen no mention of in English or American law. Nowhere has there been discovered any such device as that by which citizens are denied their common liberties as such, and even the common liberties of men, unless they could forswear their innocent lives in whole or in part.

One of the plainest principles of the English common law was that no man could be compelled to criminate himself, nor could any one be subjected to a penalty or deprived of a

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liberty because he would not swear that he had never committed a crime or done any infamous thing. But this test oath does provide that unless the persons at whom it is aimed will swear to their innocence of a long list of treasons, as well as a longer list of offences, made after the fact, their silence shall be punished as if they had been convicted of actual guilt. That this is contrary to the ordinary course of justice, see 3 Yerg. 429; 1 Green. Ev. 587; 6 Cow. 254; 1 Burr's Trial, 244; 8 Wend. 595; 4 Wend. 215; 4 Taunt. 424; 2 Swanst. 295; 16 Ohio, 623; 1 Speers, 128; 3 Hill, 395; 3 Denio, 593; 1 Curtis, 332; Pitman's opinion, 335. The same rule laid down by the authorities just quoted prevails in Missouri to-day in respect to all other cases and all other persons, and the sections in question, providing that silence is guilt, are only a special law aimed at a class of persons, a legislative judgment against those persons.

✓ *Fifth.* The sections in question disregard the ordinary course of judicial proceedings in this: they have been enacted against domestic rebels and enforced in a summary manner, without indictment or trial by jury.

It is remarkable that scarcely any person undertakes to defend these sections without insisting that domestic rebels have no rights under the laws or Constitution; that the crime of rebellion is such that it has worked a forfeiture of even those rights which peculiarly belong to criminals. It is remarkable that these sections should have been carefully made to carry out this pet idea of their authors, and that this very idea should emphatically fix on their work the definition of a bill of pains and penalties. Rebels are nothing more than criminals. They are nothing worse than criminals. As such they are entitled to the benefit of all laws made for criminals. If not so, may it please the court, who is entitled to the benefit of the criminal laws? The innocent have no use for them; and if the guilty have no claims on the rights conferred by these laws, then they are mere nullities. Wooddeson says that a British statute passed against domestic rebels, to be enforced in a summary manner, without indictment, that is, without the privilege of such trial as an indictment confers, is a bill of attainder, because a departure from the ordinary course of judicial proceedings in England. It cannot be less so here. The Constitution of Missouri since 1820 has contained the following provisions directing the ordinary course of criminal justice: "That no person can for an indictable offence be proceeded against

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criminally by information, except in cases arising in the land and naval forces, or in the militia, in actual service in the time of war or public danger, or by leave of court, for oppression or misdemeanor in office"—see art. 1, § 24, new Cons. Mo. "That in all criminal prosecutions the accused has the right to be heard by himself and counsel, to demand the nature and cause of accusation, to have compulsory process for witnesses in his favor, to meet the witnesses against him face to face; and in prosecutions, on presentment or indictment, to a speedy trial by an impartial jury of the vicinage; that the accused cannot be compelled to give evidence against himself nor be deprived of life, liberty or property, but by the judgment of his peers or the law of the land"—art. 1, § 18, new Cons. Mo. These important provisions of constitutional law have been substantially gathered from British statutes.

The language of Magna Charta is as follows: "No free man shall be taken or imprisoned, or disseized of his freehold or his liberties, or his free customs, nor be outlawed or exiled, nor in any manner destroyed, nor will we pass upon him or condemn him, unless by the legal judgment of his peers or the law of the land"—3 Sto. Cons. 661.

By an act of 25 Edward, § 5, ch. 4, it was declared: "None shall be taken by petition or suggestion made to the King or his council, unless it be by indictment of lawful people of his neighborhood, or by process made by writ original at the common law. And none shall be put out of his franchise or freehold unless he be duly brought to answer, and forejudged by course of law; and if anything be done to the contrary, it shall be redressed and holden for none." The statute (42 Edward 3, ch. 3) declares "no man shall be put to answer without presentment before justice, or matter of record of due process, or writ original according to the ancient law of the land."

These statutes, and many others reasserting and confirming them, were, by the Bill of Rights, assented to by William of Orange, and enacted by Parliament—William and Mary, ch. 2, stat. 2—proclaimed to be, and to have always been, the ancient common law—4 Tom. Jacobs' Law Dic. 148-57. It is scarcely necessary to say, may it please the court, it was never intended to abate on the part of the American people any portion of the substantial liberties of Englishmen. The war of 1776 grew out of a claim made by America to these liberties, and the battles of the revolution were fought to

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make good that claim. They made it good ; and the people preserved it in constitutional guarantees, among which the clauses above quoted are worthy to be considered. These clauses secure every citizen against annoyance from criminal charges and harassments for capital or infamous crimes, unless by indictment or presentation on oath by lawful men. They provide that no man shall be put out of his property or franchises on mere information or suggestion. They require that before a citizen shall be brought to answer, the charge against him shall be made of record, and due process issue according to the "ancient law of the land." The elder Adams (see 3 vol. Works, p. 481) speaking of common law trial by jury, says, "In this manner the subject is guarded in the execution of the laws. The people choose a grand jury to make inquiry and presentment of crimes. Twelve of these must agree in finding a bill. And the petit jury must try the same fact over again, and find the person guilty before he can be punished. Innocence, therefore, is so well protected under this wise Constitution (the British) that no man can be punished till twenty-four of his neighbors have said upon oath that he is guilty." If there be any value in the constitutional guarantees I have quoted, they secure to the citizen, in all cases where he is charged with an indictable offence, the right to be indicted and tried. They virtually declare that a charge shall be preferred in no other manner—Rawle on the Cons. p. 128. These constitutional guarantees contemplate that before any citizen can be deprived of life or liberty, or property, he shall be legally prosecuted, heard, tried and condemned. Information or suggestion of guilt may be ground for prosecutions in the army or navy, but nowhere else ; and even there the party has an absolute right to a trial. The process adopted by the new Constitution to disfranchise persons, is by mere suggestion or information. The Constitution or the election judges suggest the guilt and set the prosecutions on foot, and thus the disfranchisement is effected without any indictment or trial. The answer usually made to the argument founded on these constitutional provisions is, that there is no information filed against any one—no criminal proceeding begun—no prosecution of any sort ; no witnesses called against anybody, and therefore the constitutional provisions do not apply to the case ; the meaning of which is simply that a citizen can be disfranchised or his property confiscated for treason, without any charge or trial for treason ! The pur-

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pose of the Constitution was to protect the citizen against loss of life, liberty or property in consequence of any crime alleged against him, until a legal charge of that crime is preferred and he is allowed to make his defence. Those who seek to oppress him and take away his rights, are aware that if they make a charge he is entitled to an indictment and a trial by jury, and therefore they proceed to rob and disfranchise him without any formal charge; and claim they may rightfully do it, because they have made no charge.

But treason is an indictable offence. It cannot be proceeded against criminally on information. There must be an indictment—24 Ala. 692; 2 Parker, Cr. R., 320—and every indictment is triable by jury, and no person can be deprived of life, liberty or property but by the judgment of his peers or the law of the land. When a penalty is imposed and actually inflicted on a person for a crime committed by that person, it is not only absurd, but it is dishonest, to pretend that the person is not, in such case, criminally prosecuted. Why gravely provide by constitutional enactments in what manner criminal prosecutions shall be conducted, if a citizen may be punished without any prosecution? The common sense of the matter is that in all such cases the accused has the right to trial by jury—3 Cow. 706; 6 Mon. 643; 17 Texas, 415; 2 Hilton, 415; 37 Maine, 165. “It must be judicially ascertained that the citizen has forfeited his privileges, or some one else has a superior title to the property he possesses, before either can be taken from him”—4 Hill, 146; 3 R. I., 64; 1 Mo. 244. No man should be punished for an offence until he has had a trial and been found guilty, and a law which prohibits a trial punishes the innocent as well as the guilty. There being no accusation does not help the matter. When the Constitution requires the accused to be notified of the accusation, it means there must be an accusation; the accused has an absolute right to it. The accused has the absolute right to trial by jury. He has also the right to be so charged, that when the trial takes place, the jury shall pass on the whole charge—1 Curtis, 331. Story (3 Cons. 658) says that the provision concerning indictments is a security against prosecutions in any other mode—3 Black, 379.

Will the court consider for a moment the consequence of holding that, provided no charge is made, the accused is by that fact deprived of the right of trial touching the cause alleged for taking away his life, liberty or property? Should

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a law be passed to the effect that no citizen shall be allowed by the clerk of any court to sue out a writ; or by the recorder of any county to file a deed for record; or by any butcher, to purchase from him a piece of meat, unless he has previously filed an oath that he has neither committed treason nor experienced a sense of disaffection towards the Government of the United States in the late disturbances; what objection could be raised to its validity, provided the sections under consideration are deemed valid, because they make no charge and set on foot no prosecution? Another answer to the constitutional provisions has been founded upon an erroneous interpretation of the words "or the law of the land." This answer asserts that a party accused of treason, or other crime, has no absolute right to trial by jury, but has a right to trial by jury, "or the law of the land;" one or the other, but not both. It further insists that the 3d section of the 2d article of the new Constitution is that law of the land to which the citizen is entitled in lieu of the bill of indictment and trial by jury. Never was there a greater error. The suggestion can only spring from an utter ignorance of the whole subject. These words, "law of the land," mean not a special law, made for the case of any particular person or persons, but the general law of the land operating prospectively against all persons. They embrace the law in force at the time any act is committed, and they affirm in addition the right of the accused to prosecution by indictment and to trial by jury. Lord Coke asserts that the meaning universally attributed to these words at the time of Magna Charta, and since, was "Due process of law, and that is presentment or indictment of good and lawful men, and being brought to answer thereto by due process of law"—2 Kent Com., p. —; 3 Sto. Cons. 661—so that the words affirm the right of trial according to the process and proceedings of the common law. These words, "the law of the land," do not mean an act of the Legislature, \* \* \* "for if so this branch of the government could at any time take away life, liberty, property and privilege without a trial"—37 Maine, 165. "They do not mean that no man shall be disfranchised or deprived of the rights of a citizen unless you pass an act for that purpose;" but they do mean that it "shall be judicially ascertained that the citizen has forfeited his privileges, or some person has a better title to the property he possesses, before either can be taken from him"—4 Hill, 146. The same measure of protection is extended to life,

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liberty and property. If one may be taken without a forensic trial, there is no security for the others—*Id.* 147. When an offence is either capital or infamous, the Legislature cannot proceed in any other manner than by indictment or presentment—3 Mo. 77, *Ledford's case*. In the *Dartmouth College case*, Mr. Webster, speaking of the statute of New Hampshire, which took away the right of certain directors of the board, said: "Are these acts of the Legislature which affect only particular persons, and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone, and first: It (the law) is a rule, not a transient sudden order from a superior to or concerning a particular person, but something permanent, uniform and universal; therefore, a particular act of the Legislature to confiscate the goods of Titius or to attain him of high treason, does not enter into the idea of a municipal law, for the operation of this act is spent upon Titius only, and has no relation to the community in general. It is rather a sentence than a law. \* \* \* By the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this was so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend to establish the union of all powers in the Legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony; judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country."—5 Webster's Works, 487; 11 Pa. 494; 33 Pa. 496; 10 Yer. 59; 5 Yer. 320; 2 Yer. 599; 4 Yer. 202; 1 Chip. 237; 5 Cal. 73; 1 Del. 1; 4 R. I. 324; 5 Humph. 165; 5 Ark. 358; 1 N. H. 199; 6 Pa. 91; 3 A. K. Marsh, 73; 3 Humph. 483; 6 Cranch, 87.

*Sixth.* The sections in question disregard the ordinary

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course of judicial proceedings in this—they affect the punishment by creating a disability not incurred in the ordinary course of law.

Professor Wooddeson says he means by this such acts of Parliament as fix on a person a disability which the courts of justice could not, under the law at the time of the act, have adjudged against him. That this class of matter is found in the 3d section, and upon almost every line of it, needs no illustration.

May it please your honors, let us now review the course of the argument. Its aim has been to show these sections of the new Constitution within Wooddeson's and Story's definition of a bill of pains and penalties; and this has been done by establishing the following propositions: That these sections are adapted to political exigencies not provided for in the criminal code; that they are penal—taking away for treason committed, as they suppose, the most valuable of all the liberties of the citizen; that they assume judicial magistracy, deciding questions of law, and innovating on the crime—also on the rules of evidence, doing away with accusation, indictment, or presentment, proofs and trial; instituting inquisitions; authorizing a summary method of punishing domestic rebels; not allowing to those criminals the benefit of criminal laws; and, finally, designating a large class of citizens by certain innocent acts done by them heretofore, and then punishing them by a disability not incurred in the ordinary course of law, since no court was authorized to impose it, merely because they answer to such description; and that they are not rules of action at all, but apply to matters past when made; that they are not general, but particular laws—that is, legislative sentences or judgments. If the definitions are correct, the argument seems to be sufficient.

Allow me, if you please, now to invite your attention to several genuine bills of pains and penalties enacted in Parliament. In 6 How. State Trials, 391, is found the following:

*“An act for banishing and disabling the Earl of Clarendon.*

*“Whereas Edward, Earl of Clarendon, having been impeached, by the Commons assembled in Parliament, of treason and other misdemeanors, hath knowingly withdrawn himself, and is fled, whereby justice cannot be done upon him according to his demerits, be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in Par-*

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liament assembled, and by authority of the same, that the said Edward, Earl of Clarendon, shall and do suffer perpetual exile, and be forever banished this realm, and all other his majesty's dominions, and shall be forever disabled from having, holding or enjoying any office or place of public trust, or any other employment whatsoever.

"And be it further enacted by the authority aforesaid, that it shall be, and be taken to be treason for the said Earl at any time to return into, or be found in England, or any other his majesty's dominions, after the 1st day of February, according to the account of England, 1667; and that in case the said Earl shall at any time return into, or be found in England, or any other his majesty's dominions, after the said 1st day of February, that the said Earl shall suffer the pains and penalties of treason, and be made incapable of any pardon from the King's majesty, his heirs and successors, but by act of Parliament; and that all correspondence with the said Earl, except it be of his children, or such persons as shall be licensed by the King in council, concerning his estate and domestic affairs only, after the said 1st day of February, shall be, and shall be taken to be, of the same nature as correspondence with a traitor, and the offender shall suffer such pains and penalties as by the laws of this realm are to be inflicted upon such persons as keep correspondence with traitors; and that all letters sent to the said Earl be showed to one of the principal Secretaries of State before they be sent; and that all letters which shall be received from the said Earl be likewise showed to one of the principal Secretaries within ten days after each receipt, under the penalties aforesaid.

"Provided, always, that if said Earl of Clarendon, on or before the 1st day of February next, render himself unto one of his majesty's principal Secretaries of State, or to the Lieutenant of the Tower of London for the time being, in order to his trial, which shall be in Parliament, that then and in such case all and every the penalties and disabilities by this act imposed upon the said Earl of Clarendon shall be utterly void and of no effect, anything herein mentioned to the contrary notwithstanding."

I will now show your honors another specimen (see 15 Brit. Stat. at Large, 68); it is in these words:

*"An act to inflict pains and penalties on Francis, Lord Bishop of Rochester."*

"Whereas in the years one thousand seven hundred and twenty-one, and one thousand seven hundred and twenty-

two, a detestable and horrid conspiracy was formed and carried on by divers traitors for invading your majesty's kingdoms with foreign forces, for raising an insurrection and rebellion against your majesty, for seizing the Tower and city of London, and for laying violent hands upon your majesty's most sacred person, and upon his royal highness the Prince of Wales, in order to subvert our present happy establishment in church and state, by placing a popish pretender on your throne; and

“Whereas, for the better concealing and effecting the said conspiracy, divers treasonable correspondencies were, within the time aforesaid, carried on by letters written in cyphers, cant words, and fictitious names, which conspiracy, had it not been disappointed by the goodness of Almighty God, would have deprived your majesty's kingdoms of the enjoyment of their religion, laws and liberties, involved them in blood and ruin, and subjected your people to the bondage and oppression of Romish superstition and arbitrary power, for which execrable treason Christopher Layer has been indicted, tried, convicted, and attainted; and

“Whereas Francis, Lord Bishop of Rochester, notwithstanding the many solemn assurances by him given of his faith and allegiance to your majesty by taking the oaths by law appointed to be taken instead of the oaths of allegiance and supremacy, which oaths he had likewise taken at sundry times during the respective reigns of their late majesties King William and Queen Mary, and of her late majesty Queen Anne, and, notwithstanding he had frequently abjured the pretender, hath, in direct violation of his said repeated oaths and obligations, and to the great scandal of religion and his holy function, been deeply concerned in forming, directing and carrying on the said wicked and detestable conspiracy, and has been a principal actor therein by traitorously consulting and corresponding with divers persons to raise an insurrection and rebellion against your majesty within this kingdom, and to procure a foreign force to invade the same in order to depose your majesty and place the pretender on your throne; and by traitorously corresponding with the said pretender, and persons employed by him, knowing them to be so employed;—therefore, to manifest our just abhorrence of so wicked and abominable a conspiracy, and our zeal and tender regard for the preservation of your majesty's person and government, and of the Protestant succession in your majesty's royal family, the solid

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foundation of our present happiness and future hopes, and to the end that no conspirator may, by any subtle contrivance or practice whatsoever, escape punishment, and that all others may, by the justice of Parliament, be forever hereafter deterred from engaging in any traitorous conspiracies or attempts, we, your majesty's most dutiful and loyal subjects, the Lords, spiritual and temporal, and Commons, in Parliament assembled, do humbly beseech your majesty, that it may be enacted, and be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in Parliament assembled, and by the authority of the same, that the said Francis, Lord Bishop of Rochester, from and after the first day of June, in the year of our Lord one thousand seven hundred and twenty-three, shall be and is hereby, to all intents and purposes, deprived of all and singular his offices, dignities, promotions and benefices ecclesiastical whatsoever, and that the same, and every of them, shall from thenceforth be actually void, as if he were naturally dead; and that the said Francis, Lord Bishop of Rochester, shall from thenceforth forever be disabled, and be incapable of and from taking, holding or enjoying any office, dignity, promotion, benefice or employment within this realm, or any other his majesty's dominions, and also of and from using or exercising any office, function, authority or power, ecclesiastical or spiritual, whatsoever, and shall and do suffer perpetual exile, and be forever banished this realm and all other his majesty's dominions, and shall depart out of the same on or before the five and twentieth day of June, in the year of our Lord one thousand seven hundred and twenty-three; and that if the said Francis, Lord Bishop of Rochester, shall return into or be found in this realm, or any other his majesty's dominions, at any time after the said five and twentieth day of June, in the year of our Lord one thousand seven hundred and twenty-three, he, the said Francis, Lord Bishop of Rochester, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer and forfeit as in cases of felony without benefit of clergy, and shall be utterly incapable of any pardon from his majesty, his heirs or successors."

May it please the court, what is the difference, in principle, between the 3d section and the bills of pains and penalties just read? The latter enact that Clarendon and Rochester have committed certain acts not subject to the penalties inflicted by any laws of the realm when committed. The

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former recite the commission of acts not subject to these penalties by any law of Missouri or of Congress. The bill against Clarendon provides to annul the penalties if he will return and be tried by men who have prejudged his case. Our bill provides to allow it to be released on filing an oath, provided the judges of election believe the oath. The bills against Rochester and Clarendon deprive their victims of all their offices and functions, public and private, and all employments. Ours deprives its victims of all liberty, 1. To vote; 2. To hold office or be a candidate; 3. To sit as a juror; 4. To practice law; 5. To be an officer of a corporation; 6. To be a professor or teacher in any school; 7. To hold any property in trust for religious purposes; 8. To act as a bishop, priest, deacon, minister, elder or clergyman of a religious denomination; 9. To preach or teach as such, or solemnize marriages.

✓ All of them proceed in disregard of the ordinary course of judicial proceedings.

I will now show the Court a sample of another production. See 15 Brit. Stat. at Large, p. 65, and read as follows:

*"An act to inflict pains and penalties on John Plunket.*

"Whereas, in the years one thousand seven hundred and twenty-one, and one thousand seven hundred and twenty-two, a detestable and horrid conspiracy was formed and carried on by divers traitors, for invading your majesty's kingdom with foreign forces, for raising an insurrection and rebellion against your majesty, for seizing the Tower of and City of London, and for laying violent hands upon your majesty's most sacred person, and upon his royal highness the Prince of Wales, in order to subvert our present happy establishment in church and state, and to place a popish pretender on your throne; and, whereas, for the better concealing and effecting the said conspiracy, divers treasonable correspondencies were, within the time aforesaid, carried on by letters written in cyphers, cant words, and fictitious names; which conspiracy, had not Almighty God in his great mercy disappointed the same, would have deprived your majesty's kingdoms of the enjoyment of their religion, laws and liberties, involved them in blood and ruin, and subjected your people to the bondage and oppression of Romish superstition and arbitrary power, for which execrable treason Christopher Layer hath been indicted, tried, convicted and attainted; and whereas John Plunket hath been a principal actor in the said horrible and detestable conspiracy, by traitorously

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consulting and corresponding with divers persons to raise an insurrection and rebellion within your majesty's kingdom, and to procure a foreign force to invade the same, with a design to depose your majesty, and to place the pretender on your throne, by traitorously corresponding with the said pretender, and by engaging in a most execrable and villainous design of laying violent hands upon the sacred person of your majesty (whom God long preserve): therefore, to manifest our just abhorrence of so wicked a conspiracy, and our zeal and tender regard for the preservation of your majesty's person and government, and for the Protestant succession in your majesty's royal family, the solid foundation of our present happiness and future hopes; and to the end that no conspirator may, by any contrivance or practice whatsoever, escape punishment, and that all persons may be by the justice of Parliament forever hereafter deterred from engaging in any traitorous conspiracies or attempts, we, your majesty's most dutiful and loyal subjects, the Lords, spiritual and temporal, and Commons, in Parliament assembled, do humbly beseech your majesty that it may be enacted, and *be it enacted* by the King's most excellent majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in Parliament assembled, and by the authority of the same, that the said John Plunket shall be detained and kept in close and safe custody, without bail or mainprize, during the pleasure of his majesty, his heirs and successors, in any gaol or prison within the kingdom of Great Britain; to the custody of the gaoler or keeper whereof the said John Plunket shall from time to time be committed, in pursuance of this act, by warrant under the hand and seal of any Secretary of State of his majesty, his heirs or successors, which warrant or warrants any Secretary of State for the time being is hereby authorized and empowered to make; and that the said John Plunket shall forfeit to his majesty all his lands, tenements, hereditaments, goods and chattels whatsoever.

"II. And for the more sure detaining of said John Plunket in safe custody, be it further enacted by the authority aforesaid, that if the said John Plunket shall break such gaol or prison to which he shall be so committed, or shall escape out of the custody of the person in whose custody he shall be by virtue of such commitment, that then the said John Plunket, and all and every person and persons whatsoever who shall be aiding or assisting the said John Plunket

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in breaking such goal or prison, or in making such escape as aforesaid, or who shall by force take or rescue the said John Plunket out of such custody, gaol or prison, during the continuance of his imprisonment by virtue of this act, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in case of felony, without benefit of clergy."

The several provisions of this bill against Plunket are worthy of a careful reading.

Before laying down these old records, I will present the court with still another relic of a species of legislation, which it was intended by the founders of our institutions should never obtain here. In 29 British Stat. at Large, 241, you have a bill in this form—it is a bill to take away the right of suffrage for crime:

*"An act to incapacitate* John Burnett, Charles Hannington, Thomas Haselgrove, Ralph Moor, Thomas Parsons, Thomas Snook, Jr., Thomas Hannington, John Robinson, William Cheesman, George Brown, John Parsons, John Curl, Frederick Dean, William Dean, Samuel Tuppen, John Sawyers, Thomas Crowter, Thomas Pockney, Joseph Dedman, John Dean, John Whiting, William Stevens, John Bawcomb, Robert Parker, John Hogsflesh, John Purse, John Dean, Thomas Jennings, John Snook, Jr., Richard Tilstone, William Turner, Walter Sawyers, Charles Mitchell, John Jarmand, John Wood, Friend Daniel, William Gratwick, Nathaniel Hillman, Thomas Roberts, John Ashman, William Cooter, Thomas Frost, Michael Smith, Richard Carver, Michael Durrant, Emery Churcher, Walter Broad, Richard Stoneham, James Bennett, Clement Freeman, William Jupp, Thomas Crowter, John Barnard, James Mitchell, James Millar (otherwise Miller), William Newnham, Jeffrey Carver, Randall Button, James Carver, John Martin, John Dedman, Sr., William Jennings, William Hards, Thomas Gear, William Rushbridge, Henry Robinson and Henry Hannington, from voting at election of members to serve in Parliament, and for the preventing bribery and corruption in the election of members to serve in Parliament for the borough of New Shoreham, in the county of Sussex.

"Whereas a weak and corrupt society, calling itself the Christian Society, hath, for several years, subsisted in the borough of New Shoreham, in the county of Sussex, and con-

sisted of a great majority of persons having a right to vote at elections of members to serve in Parliament for the said borough; and whereas it appears that the chief end of the institution of the said society was for the purpose of selling, from time to time, the seat or seats in Parliament for the said borough; and whereas said persons were members of the said society; in order, therefore, to prevent such unlawful practices for the future, and that the said borough from henceforth be duly represented in Parliament, be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said persons shall be, and by the virtue of this act are, from henceforth, incapacitated and disabled from giving any vote at any election for the choosing a member or members to serve in Parliament."

See further 8 Brit. Stat. at Large, 444; 13 id. 306; 10 id. 397; 3 How. St. Trials, 158; 13 Brit. Stat. at Large, 286; 8 id. 44; 10 id. 6; 13 id. 213; 18 id. 455; 15 id. 66.

These instruments, upon all whose parts are stamped the worst features of factious malignity and tyranny, call for no further criticism. As illustrations of the principles of such bills as defined by the text writers, they are perfect; as monuments of the wisdom of our fathers in declaring that never, never should any such find place in our legislation, it is hoped they may prove more lasting than marble or brass.

The plaintiff insists that sec. 3, art. 2, is an *ex post facto* law in the meaning of the Constitution of the United States; and being void for that reason, the other sections in aid must fall with it.

There is no argument and no authority which would overthrow a bill of attainder, that would not at the same time destroy the constitutional validity of an *ex post facto* enactment. An *ex post facto* law is one which punishes an act committed before it was made, in a manner it was not punished when committed; and this punishment may be capital, or it may consist in a mere forfeiture or disability. It may consist merely in such a change of the rules of evidence as makes it easier to convict the accused—3 Dallas, 386; 6 Cranch, 87; 3 Murphy, 234, 327; 1 Kent's Com. 408; 1 Black, 193; 2 Gallison, 193; 2 McLean, 212; 22 N. Y. 139; J. R. 1; 4 N. H. 287. When a law declares that if a citizen shall do any act manifesting disaffection towards the govern-

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ment, or any officer thereof, he shall be disfranchised, that is the creation of an offence before the fact; but when a law declares that he who has heretofore done any act manifesting disaffection towards the government shall be disfranchised, that is the creation and punishment of the offence after the fact; that is an *ex post facto* law, and falls within the constitutional prohibition. There can be no liberty in any State where the legislative power is competent to make such enactments. Walker (Amer. Law, 423) reviews the constitutional guarantees of liberty in this country, and adds, with something of patriotic enthusiasm: "The result is that we enjoy the glorious privilege of knowing that the past is secure so far as punishment is concerned. Under no state of excitement can a vindictive Legislature animadvert upon past transactions. If we take care to escape existing penalties, we need be under no apprehensions as to retrospective ones."

3. The plaintiff insists that sec. 3 of art. 2 is void because it assumes, on the part of the State, power and jurisdiction to punish offences against the United States, and to punish such offences regardless of the power of pardon and amnesty lodged in the President, and in defiance of the wishes and policy of the Government of the United States.

Two propositions have been strenuously insisted on by the friends of these sections. 1. It is said that they inflict no punishment for any offence either before or after the fact; but that they are mere qualifications of persons to vote, preach, practise law, &c.; that the State has the unquestioned authority to regulate suffrage and other privileges of the citizen, and is by said sections only regulating these important matters. It is not denied that the State possesses the power to declare what qualifications shall attend the right of suffrage; nor can it be denied that the State possesses the power to punish crime. The two powers must not be confounded with each other. If they are kept carefully separated in the mind, the rights and duties which belong to them will be also separated, and all difficulties in comprehending the proper range and scope of either power will vanish.

A declaration by constitutional authority that all persons of a certain age, or sex, or degree of intelligence, shall enjoy the liberty of suffrage, would be a legitimate exercise of the power of the State to regulate suffrage; but a declaration that certain persons, already citizens of the State, are deprived of the liberty of suffrage, which they possess, because they have committed treason, is an exercise of the power to

punish crime, and has no binding force, because it is in conflict with constitutional provisions which limit and control that power.

There is no doubt that the power to punish crime may, under certain restrictions, be employed to interfere with the liberty of suffrage and every other liberty of the citizen. This fact has always had recognition in the Constitution as well as in our statute law. In 1820 the Constitution of Missouri provided the General Assembly should have power to exclude from every office of honor, trust or profit within this State, and from suffrage, all persons convicted of bribery, perjury or other infamous crimes, and this provision has never been changed. The statutes already quoted in these remarks abundantly show how willing the Legislature has been to exclude from our elections the ballots of all convicted felons. The people of Missouri have never objected to the employment of this power. No good citizen, no man who really values the liberty of suffrage and the transcendent importance of the purity of elections, would object to it. On the other hand, no Missouri Legislature has ever dared to assume the power of convicting any man of a crime, or of depriving him of suffrage, or of any portion of his liberty, without a judicial trial. Nor did any Convention, until the present unhappy troubles, ever exercise or claim the power so to do.

While it is not denied that the Convention had power to provide for the punishment of crimes, it is insisted that it could not do so by any bill of attainder or pains and penalties. It could not disfranchise without judicial investigation. It could not enact that any rebel had forfeited the right to a legal trial by indictment and jury, or proofs of his guilt, or any other benefit of those criminal laws which were made for the benefit of alleged criminals. It could not impute treason to any person and then quote its own statement as proof of such person's guilt, or infer the guilt from the silence of any person to respond to an inquisitorial oath.

If, therefore, the Convention had power to regulate suffrage in Missouri, which is not denied, they had no power to inflict disfranchisement for the crime of treason in the manner they did.

The State has the power to regulate contracts, and prescribe what evidence shall establish their existence; the State has power to regulate marriage and prescribe the age of the parties, and the ceremonies by which they shall be made husband and wife. The State has the power to pro-

tect a citizen in the enjoyment of his religion, and provide the means of such protection; but what would be thought of a law which declared that no man should accept a deed for land unless he would first swear he had never been intoxicated; that no man should marry a wife unless he should first swear he had never promised to marry another woman, and no man should preach unless he would swear first he did not believe in the Holy Trinity.

Does not every one see at once that these laws, so called, would be mere cheats—that there is no regulation of contracts or marriage, and no protection of religion in such enactments; that, in fact, the operation is to punish the act of intoxication, the prior contract of marriage, and the belief in the Holy Trinity, wherever found, and to specially inflict penalties on the class of persons described by such language. It is worthy to be noticed that while the intention to punish is so strenuously disclaimed, the same persons who are disfranchised by sec. 3 are pursued with the most vindictive persecution through all the other proscriptive clauses of the Constitution.

The other proposition urged in favor of these sections is, that the State must have power to protect itself. That self-protection is the great first law, and, therefore, the Convention had power to exclude from all participation in the Government the enemies of the Government.

But none of those who use this argument will give any intelligible definition of what they mean by "the State." They assert that the State has power to protect itself—that self-protection is the first law—and that the State may use any power that is necessary for this purpose. But what is the State in the meaning of these persons? Is it the militia? Is it the Governor? or the Legislature? Is it the Union party? Is it the Radical party? Can a political majority, which happens to dominate for the time, arrogate the title and powers of the State, and arbitrarily set forth its notions as the perfection of reason and ultimate standard by which the public good and the public ill, and the friends and enemies of the State are to be ascertained and dealt with? Is this the light in which we are to view the powers of the Convention. If so we can understand that the Convention, as the representatives of the political party, claimed omnipotent powers, and held themselves emancipated of all restraints. If this is the scope of the argument, I do not hesitate to denounce it as breathing the worst spirit of the worst men

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in the worst times. Such has been the tyrant's plea from the beginning of the world. An Athenian Assembly or a Roman Senate never set up larger pretension, nor did either ever announce a more unqualified tyranny.

I shall now ask leave to present my own idea of the State, and proceed to examine the nature of its powers of self-preservation. This question, "What is the State?" ought not to be difficult for any American. If our political history has had any significance, its whole purpose has been to answer this very question. The State of Missouri is a political organization based upon specific principles. Russia is a despotic State, based on one principle, viz.: that the Czar is an absolute ruler, whose will is law. The State of Missouri is a free State, based upon the principles of liberty. These principles are defined by its organic laws. Whoever or whatever protects these principles, protects the State; whoever or whatever makes war on these, makes war on the State. Among these principles of liberty are the following: The rights of conscience are sacred; speech is free; the press is free; involuntary servitude, save for the punishment of crime, whereof the party shall have been duly convicted, shall not exist; justice shall not be sold, denied nor delayed, nor private property taken without compensation; trial by jury remains inviolate; no man shall be deprived of life, liberty or property except by the judgment of his peers or the law of the land; no *ex post facto* laws or bills of attainder; the powers of the Government to be divided among the separate departments; all political power is invested in and derived from the people; all government is derived from them, and is instituted solely for their good. Now, it will be observed that one of the foundation stones of the State is the doctrine that it is a popular government, emanating from the will of the people, governed by the people—solely instituted, carried on, administered for their good. Nowhere is it hinted that the people are made for the good of the State, nor that the State is above the people; but everywhere that the State is a mere instrument for promoting the popular well-being. All government, says the State of Missouri, "originates from the people and is founded on their will only." Observe, it is not said from the virtuous people, nor the people who have never rebelled, nor the people who obey the laws.

It proclaims merely that the authority of the people—such as they are—with all their weaknesses and all their faults,

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and it trusts to and depends upon them. The State of Missouri, thus defined, stands before the world emphatically a popular government, limited and controlled only by the checks and balances of its Constitution. The Government of Great Britian, from which we separated in 1776, was not a government of the people. It was based on the opposite idea—that is, that the people cannot be trusted, are unfit to manage, and must have masters; one of these masters they called King. To him the people owed allegiance. On his death the right to govern passed to another by descent, like a tract of land. Besides Kings, they had many other hereditary rulers, called noblemen—lords, temporal and spiritual—deriving their right to rule by inheritance or special grant of power from the throne, and without the consent of the people. These claim to be a purer procelain of earth, and a better blood than falls to the lot of common men. This is the sort of government which, under several modifications, prevails now in almost every portion of Europe. About these governments there is no mystery. The source from which they sprung was popular disfranchisement.

Go and examine the title to power of the aristocrats of Europe, and you will find that a stronger party of armed men conquered and bore down a weaker party, and followed this conquest by laws which perpetuated their power. Perhaps the weaker party had been guilty of flagrant crimes. Perhaps their crime was simply being in the minority. But was it right to set up over either the guilty or innocent the iron rule of abitrary government? Is there any justification for taking away the liberties of any people? Is popular government right or is it wrong? Is it the theory of our government that when a portion of the people constituting and governing the State levy demestic war they shall be attainted, disfranchised, and cast out of its pale, by an act of the majority? And when, among those who remain, another feud shall arise, shall the minority be again cast out until nothing is left but a few aristocrats, whose power has been cemented by blood and terror? I say that this is not the government of the State of Missouri! Defined as I have expressed it, the State is a noble institution, proclaiming and guarding liberty. With any other definition, it is anything that tyrants make it. Russia is a State, and doubtless exerts the power of self-preservation over the liberties of the people. There is no such maxim of American liberty as safety of the

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State. But our motto is, on the contrary, *salus populi suprema lex*—the safety of the people is the supreme law—and no State is worth preservation, even for a moment, which does not cherish this motto. I say that disfranchisement by legislative act of the majority is at war with the avowed principles of the State. I say this on the faith of our Bill of Rights and of the Constitution of the United States, which is part of its organic law. I say, may it please your honors, whoever maintains the contrary, is not protecting the State, but making war upon it; and he who shall succeed in introducing this wretched principle of revenge and anarchy into practice, will have ruined his country.

In so far, may it please the court, these provisions of the new Constitution have been considered almost entirely as legal questions. The effort has been to show what are the interpretations placed upon the language of the Constitution of the United States, and what the scope and bearing of these guarantees of liberty; and how, as long as they are sacredly maintained, life and liberty and property will be reasonably secure from the violence of faction, exerting its influence by means of *ex post facto* laws and attainders. To one who is unacquainted with the history of man, it would seem needless to raise a barrier against injustice so palpable. In one who knows what that history is, it would be criminal not to provide every guard which the profoundest wisdom may suggest. In all the ages of the world, in all the phases of its history, under every relation in which the individual has been called to act—amid all the combinations, social, political, religious, into which men have entered—the worst enemy of man or his race has been man. The peace of the first family was broken by a display of his infuriate and terrible revenge. Alas! that this ungenerous passion should still rage in his bosom with unabating fires. If we look back over the pathway where he has been moving for the thousands of years during which we have any authentic records, we behold the melancholy ruins of his best works, erected and sustained long enough to give life to hopes and then miserably destroyed by his own hands. His history has been one unceasing struggle for political rights. To secure his political rights his schemes and inventions have been endless, and his blood has been freely shed. But where are the republics which he has so repeatedly and so boastfully proclaimed? Buried in untimely graves which he himself has digged. A divine religion, vouchsafed to him by infinite mercy and justice, which

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was foreshadowed by inspired prophets, ushered upon him with bursts of heavenly harmony which angel tongues came down to teach him, breathed nothing but accents of love, and peace on earth and good will to man. But it is this very religion in which he has found the warrant for every species of persecution and cruelty. Man claiming for himself an individual right to liberty of conscience, has been swift to deny the same right to his brother. Exulting in the freedom of his own intellect, and pertinaciously resisting every effort to enslave his own thoughts, he has constantly endeavored to destroy the happiness and crush the right to this liberty in others. It is in such contests that the earth has been filled with misery, and the very altars of the Church bathed in the blood of contending factions.

Our fathers were wise men, and they labored in their day for the good of their race. They enjoyed peculiar advantages for the work which fell to their lot. They had been tried in the school of adversity. They had felt the rod of a tyrant, and knew what oppression was. It was their mission to protect their people, who were few and weak, against the many and the strong, and establish the fitting guards for liberty under all circumstances. Our mission to-day is very different. We are to restrain the excessive indulgence of our own power. We are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants ourselves. We are to be generous to the fallen, and just to liberty and to mankind. We have no bulwarks to erect for freedom. We need only preserve and defend such as we have. But to do this we should fully comprehend and fully appreciate the nature and purpose of our constitutional heritage. Never was any constitution of government laid out with a more thorough knowledge of the nature of man. The founders of American liberty knew that parties and violent party excitements would belong to the government they established—that that was a consequence of liberty. But they knew when men are dispassionate they are rarely cruel; that when they are disinterested they are generally just. Their care was to provide such checks and balances as would give passion time to cool, avoid hasty action, invite reflection, secure deliberation and intelligence in the enactment of the laws, and prevent, by separation of powers those extensive combinations by which alone the administration can be rendered subservient to the will of a mere popular faction—the most deplorable of all the evils which can possibly befall a

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free State. They believed that "there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates, or if the powers of judging be not separated from the legislative and executive powers"—Federalist, No. 57, p. 224. Impressed with these views, they provided that every law should have the assent of one legislative body; that it should then be presented to and be considered and approved by another legislative body; that it should then undergo the scrutiny of another independent department before it took the name of law; that no legislative judgments, attainders, or *ex post facto* laws, should be passed; that criminal prosecutions should begin by indictment; that judicial powers should belong only to the courts of law; and that trial by jury should remain inviolate.

The question now arises, after all they have done, whether they succeeded in their purpose—whether the late Missouri Convention was an irresponsible body wielding omnipotent powers, or whether it was a body of limited powers? Mr. John Quincy Adams, in 1831, denied the whole doctrine of absolute political power, and proclaimed the inalienable rights of man—1 Sto. Cons. 195, note.

It is certain that this Convention intended to devise and execute with their own hands a stupendous scheme of political proscription. It is certain they set up a claim to absolute powers, and swept out of their way whatever stood between them and the accomplishment of their purpose—they removed all important officers in the State without any charge or cause assigned, and filled their places with such as were supposed to be their partisans, and brought the entire State government to the feet of a faction. This preparation being made, they assumed administrative and judicial functions, disfranchised the whole Secession party, and thousands and thousands of others who never violated any law; they provided that none of their victims should have any hearing or trial; they refused them justice and denied all remedy; they issued their mandate to the courts, degrading the judges from their proper functions—virtually making them inquisitors, common informers, and leaving them nothing to investigate but the arbitrary will of the Convention.

Let us concede to the Convention that it is an unchecked body, possessing all the powers which it claimed; that it has violated no law, and there is no redress by constitutional restriction. The effect of all this cannot possibly be mistaken. Revenge and cruelty, and oppression, are trees that bear bit-

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ter fruits. The new Constitution party may possibly lose power. There was never yet a party under an elective system that did not lose power. The vices or errors, and sometimes the virtues of a party, will destroy it. That whimsical and capricious thing, the popular favor, vibrates like a pendulum. Let us suppose that the party which made this prescriptive Constitution shall become odious, and that the victims of the present moment hold in their hands the fortunes of their oppressors. We may reasonably expect then another Convention. In such an event, who will say that the spirit of revenge will be less fierce than that which reigned in the late Convention? I say, not that it would be right, but that such a thing would not be unnatural.

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There are yet other forms in which the tyranny of unchecked legislation has manifested itself. I allude to the systems of express class legislation. I should more properly say class attainders. Of this nature were all those laws by which Jews were required, under pains and penalties, to wear a peculiar dress; to abide in a designated place; prohibited from marrying a Christian, or eating with one, or using the same bath, or entering into certain contracts: by which Catholics have been prohibited from acquiring property, or educating their children, or marrying a Protestant, or appearing at court, or living in London or within ten miles of it, or removing more than five miles without a special license, or practising medicine, surgery or law, or acting as judge or clerk or officer of any corporation; and by which no one could employ a Catholic servant without paying a forfeiture of £10 a month for so great a crime. Days might be employed in reciting the history of such monstrous legislation and yet not exhaust the painful theme. It was in contemplation of this history and the frightful working of that spirit of vengeance which marks the course of unbalanced parties that Mr. Adams was led to exclaim, "Of all the spirits that we read of out of hell this is the last that any enlightened friend of liberty would wish to inculcate." One would think the facts we gather from the ancients were quite sufficient to justify this expression of horror. But modern times have produced another specimen yet more terrible. "The law of the suspected," passed by the commune of the city of Paris in 1793, was a volcano of human ferocity before which every other proscription fades into insignificance—it was a demon at whose throne the congregated fiends and

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devils should bow with reverence. It ordered the seizure and imprisonment as public enemies of all those persons—

“1. Who, in the assemblies of the people, check their energy by crafty addresses, turbulent cries and threats. 2. All those who, more prudent, talk mysteriously of the disasters of the Republic, deplore the lot of the people, and are always ready to propagate bad news with affected grief. 3. All those who have changed their language and conduct according to events; who, silent with respect to the crimes of the Royalists and the Federalists, disclaim with emphasis against the slight faults of the patriots, and, in order to appear Republicans, affect a studied austerity and severity, and who are all indulgence in whatever concerns a moderate or an aristocrat. 4. All those who pity the farmers and greedy shop-keepers against whom the law is obliged to take measures. 5. All those who, though they have the words *liberty*, *republic*, and *country*, continually in their mouths, associate with ci-devant nobles, priests, counter-revolutionists, feuil-lons and moderates, and take an interest in their fate. 6. All those who have not taken an active party in anything connected with the revolution, and who, to excuse themselves from doing so, plead the payment of their contributions, their patriotic donations, their services in the national guard by substitute or otherwise. 7. All those who received the Republican Constitution with indifference, and expressed false fears concerning its establishment and duration. 8. All those who, though they have done nothing against liberty, have done nothing for it. 9. All those who do not attend their sections and allege as excuse that they are no speakers, or that they are prevented by business. 10. All those who speak contemptuously of the constituted authorities, of the signs of the law, of the popular societies, and the defenders of liberty. 11. All those who signed counter-revolution petitions, or frequented ante-civil societies and clubs. 12. All those who are known to have been insincere partisans of Lafayette and of those who marched to the charge in the Champ de Mars.”

Under such a law, of course, the prisons of Paris were filled with victims. Political hate and personal and private malice did their work. Under such accusations fell the whole noble party of the Girondists. The only showing of offence which the Girondists appear to have exhibited, was their unshaken sense of justice; the only crime they committed, their indomitable courage in resisting and defying aggression. On

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such charges they were condemned, not punished, but *disqualified* to live and *regulated* out of existence.

I ask, in the language of Mr. Adams, "In the name of human and Divine benevolence, is this the Government under which we live? Are there no constitutional restraints that may be legally invoked against such enactments? Is it possible that our Legislatures are prohibited from passing such laws, but that a party, having a majority of votes for the moment, may call a Convention, and that this Convention is an unchecked body with omnipotent powers? If so, then what is that liberty worth, which may be swept away by every passing breath of popular feeling? If, may it please your honors, our "Law of the suspected"—this notable section 3 of article 2—is a valid act of legislation—is neither an *ex post facto* law, nor a bill of attainder;—if a majority of the people may by such a proceeding disfranchise, outlaw or banish their political opponents for actual or fictitious crimes, without proofs and without trial, under our system of government, what more security is there for a citizen of Missouri than there was for a citizen of Athens, or Sparta, or Rome?

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May it please the court, this great question of war is settled. The Government is saved from armed foes. The Constitution is secure from insurrection and violence. And now a great question arises and demands a settlement: What is the Constitution? I may almost propound it in this way: Have we any Constitution? If we have, does it contain guarantees of liberty? Does it any longer secure a trial by jury, or an indictment according to the ordinary course of judicial proceedings? Has any one who is charged with crime a right to hearing and proofs of guilt as heretofore? Or is it now the fact that life and liberty and property are held only by the feeble tenure of popular passion and prejudice? Are we henceforth to be victimized by legislative judgments, *ex post facto* laws, bills of attainder, and inquisitorial processes, emanating from State Conventions, until, like so many other republics, we are sunk in the deep and bottomless abyss of anarchy and revolution?

This is the question presented to the country. The sections of the Constitution under consideration assume powers destructive of liberty. The solution is forced at last into this department. The judiciary is solemnly invoked to perform the duty for which it was created. The judiciary holds in its hands the liberties of the people. It remains to be seen

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whether it will perform its office ; or whether it will abandon the Constitution to a political faction who have assumed arbitrary powers, and the people to anarchy and bloodshed.

*T. T. Gantt*, for plaintiff in error.

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The clause of the new Constitution relied on by the demurrants is utterly inconsistent with the idea of limited constitutional government. Nor is that all. It violates the idea of limited constitutional government in two particulars which are prohibited by the Constitution of the United States. This I will attempt to demonstrate. No time will be wasted in commenting upon the general offence against humanity, justice, reason, of which this clause is guilty. It is admitted that it is impossible to create powers competent for doing good without giving them energy enough to inflict evil if abused by faithless depositaries, and that the abuse of given power by a Legislature is not the subject of animadversion by a court of justice. But it is contended that usurpation (the attempt to exercise a power that is forbidden by the supreme authority) is a proper subject of judicial action ; that courts are established to rebuke such attempts, to pronounce them invalid, and to protect the citizen against them.

As this is the frame of the argument which we propose to submit to you, it is manifest to what little purpose the demurrant has employed himself in the superfluous task of demonstrating that the people are the source of all power in our system. No one ever thought of questioning this axiom, and surely the man must be blind who is serious in imputing such a design to the plaintiff. But though the people be the source of all power, the question remains, what portion of this power have they confided to those who have been deputed by them to effect certain governmental objects? A State of this Union possesses in that ultimate depository of all of its powers, the people of the State, rights, franchises, liberties and privileges which are almost without limit. So far as any limitations are imposed upon it by its own authority, it needs no argument to show that the limitation may be removed by the authority which imposed it. The provisions of its own Constitution, then, are to this extent never unalterable. Whenever the people of the State see fit to change these, there is no restriction upon the exercise of this discretion. But in these United States we have the advantage of some checks to disorder which are to be found beyond our

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State governments. There is a grand central balance-wheel in our political machinery with which all its other mechanism must be brought into full harmony. This balance-wheel is the Constitution of the United States. By that instrument several well known limitations are imposed on the several States. When that Constitution was formed, it was well understood by its framers that popular, no less than monarchical or oligarchical, governments were subject to the temptation to abuse power and practise oppression. It was well known that to embody in a State Constitution a provision which the majority of the people of the State could sweep away in a moment of excitement, was a most imperfect guard against misgovernment. It was notorious that many of the States of the old confederation had exercised the odious power of passing bills of attainder and *ex post facto* laws. Other exercises of power conducing to disorder, and impairing the general welfare, had also been practised by the individual States. It was from an experience of the evils of which the preceding twelve years had given mournful examples, far more than from any speculative notion of what government in the abstract should be, that the sages of 1787 were led to embody in the Constitution the limitations it contains upon the powers of the States. By the adoption of that Constitution all of the thirteen States that acceded to it became on the instant shorn of the prohibited powers. In respect of all the States that have since been admitted into this Union, these obnoxious powers never had any existence. Any State at this day attempting to exercise any one of them is simply guilty of usurpation as plain as that which can be predicated of any individual tyrant. If we stood here to impeach the justice, the equity, or the expediency of this provision, we should of course be told decisively that for a court of justice to criticise the act of a State, or of persons claiming to represent the State, from such a point of view, would be a transcending of the functions of the judiciary. If we should argue that this provision is in conflict with the declaration of rights to be found in the Constitution of 1865, we should in all likelihood be told that it was a most questionable exercise of judicial discretion to condemn a positive provision of the Constitution because of its non-conformity with the abstract principles of government which were approved and proclaimed by its framers. But no such reply can be made to us when we designate a pointed prohibition, by an authority acknowledged to be paramount, to do what we say

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this provision seeks to accomplish. We may be told to make out our case—to demonstrate clearly that section 3 of article 2 does effect, was and is forbidden by the Constitution of the United States.

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I say, then, that this section 3 of article 2 of the new Constitution of Missouri violates the 10th section of the 1st article of the Constitution of the United States in two particulars. 1st. It is a bill or act of attainder, passed by State authority; and the 10th sec. of the 1st art. of the Constitution of the United States declares that “no State shall \* \* pass any bill of attainder.” \* \* 2d. It is an *ex post facto* law, and the same section says “no State shall pass \* \* any *ex post facto* law.” The establishment of either proposition will suffice. It is believed that both are capable of demonstration.

I will first examine into the nature of a bill of attainder, ascertain its properties and distinguishing characteristics, and see whether these are predicable of the clause in question. As the Constitution of the United States forbids, both to the General Government or to any of the States, the passage of any bill of attainder, we must look to the jurisprudence of other lands, or the history of ante-constitutional times in our own country, for examples of the forbidden thing.

The form of words employed implies a bill which attaints any individual, or number of individuals, or class of individuals—a bill which inflicts attainder upon any person, or any number of persons, or any class of persons.

In order to know the full import of these words, we must next ascertain the meaning of “attainder.” It is that condition in which a man stands who has been sentenced to the pains and penalties of felony. Blackstone tells us: “When sentence of death is pronounced, the immediate, inseparable consequence, by the common law, is attainder. For when it is now clear, beyond all dispute, that the criminal is now no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him. He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation. He cannot be a witness in any court, neither is he capable of performing the functions of another man. This is after judgment; for there is a great difference between a man convicted and attainted, though they are frequently through inaccuracy confounded together. Upon judgment,

therefore, of death, and not before, the attainder of a criminal commences"—4 Blacks. Comm. 380-1.

To this condition a culprit is brought when he stands condemned of felony and is sentenced to endure its penalties. The penalty of felony, for which alone, by the common law, a man could be judicially attainted, was disfranchisement, death, and forfeiture of goods. Of the more aggravated felony of treason, corruption of blood, which involved forfeiture of land, was part of the consequences. In this country, we do not, as our forefathers did, esteem the theft of twelve pence grand larceny, and hang a man for its commission; nor do we punish capitally any felonies below the grade of murder. We do, however, annex certain marks of infamy, and certain penalties, disfranchisements and disabilities, to a conviction for that class of felonies which we regard as stamped with peculiar turpitude. Of these may be enumerated treason, murder, perjury, forgery, and various other felonies, in the 1st, 2d, 3d, 4th, 5th and 6th articles of chapter 50, R. C. 1855, defining crimes and their punishment.

The law in force in 1865 prescribed, as part of the consequence of a judicial attainder for these crimes, a loss of civil rights—an incapacity to vote at any election, to hold any office of trust or profit in this State, or to perform the functions of a juror—§ 13, art. 1; § 46, art. 2; § 70, art. 3; § 36, art. —; § 47, art. 5; § 18, art. 6.

Such is the nature of attainder by judicial process. This description of attainder is familiar to us. It is the means of preserving the order of society with which no statesman and no lover of freedom ever found cause of quarrel. It is the punishment of crime judicially ascertained. The careful guards thrown around the accused by the humanity of the law need no recital here. When these fail him, it is only because every presumption of innocence vanishes, and he must suffer punishment in order that others may by his example be deterred from crime.

But the Constitution forbidding any State (as well as the United States) to pass any bill of attainder, what is meant by that prohibition? Clearly, that the States are forbidden to inflict death, or any other penalty or deprivation annexed to felony by any act of legislation, ordinary or extraordinary. They are forbidden to do by the instrumentality of a deliberative body what their courts of justice executing the criminal law can rightfully and lawfully do. They are forbidden to do by the vote of an assembly, not governed by the rules

laid down for the protection of the rights of all, even the guilty, what can only be safely entrusted to courts of justice and the due course of law. A State cannot, then, declare the guilt of any person or class, or inflict punishment, except through its courts of justice. It makes laws through its Legislature, defining crimes and affixing their punishment; and it declares that all who offend against these shall be punished. But no criminal law can ascertain and name a guilty party. Moreover, all criminal law must be prospective. It cannot say that all who have in times past done a particular act shall be punished, but only that all who thereafter shall do that act shall incur certain penalties on conviction. A criminal law forbids all persons to do an act under stated sanctions. An act of attainder declares that a particular person or class, for having already done a designated act, shall be subject to certain pains and penalties. It is this dangerous exercise of power which is forbidden to a State. The prohibition is directed against any machinery which ingenuity might see fit to employ. It is not merely said that no State Legislature shall pass such an act, but that no State shall do it; that is, the whole power of the State is under a disability to perpetrate, directly or indirectly, that act of tyrannous injustice which is known to the jurisprudence of England and America as a bill of attainder. The scope of this prohibition, then, is to deny to any State Convention, or State Legislature, or General Assembly, or general court (for the style of the body is indifferent), the power to sentence any person, or class of persons, to any of the pains and penalties which are among the consequences of an attainder for felony by judicial process.

Such being the meaning of the prohibition, does sec. 3 of art. 2 come within it? Without setting out the section at length, I may say that it enumerates eighty-six particular acts and manifestations of sentiment, and declares that no one who has at any past time done any of the acts or manifested any of the sentiments shall vote at any election in this State, hold any office of trust or profit in this State, or perform various other functions of citizenship. It does not say that whoever does any of these acts, or manifests any of these opinions hereafter, shall, on conviction, be disabled from exercising any of these franchises, liberties and rights; but inflicts this disfranchisement on all who have done the least of these things in times past. Some of the acts and sentiments thus treated were never crimes in Missouri before, and are

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not now. Others were high crimes against the United States, while some are violations of our own criminal code, and under it amount to felony. Criminal law can only deal with what it forbids under penal sanctions: and whatever be the moral nature of many of the things enumerated in this 3d section, it is inconsistent with every principle of jurisprudence to treat and punish as a crime anything which, when done, was not known as such to the law. Moreover, the least of the things mentioned in it is sufficient to insure the full penalty; and some of these things are not criminal at all. But the argument here does not depend on this distinction. It might be safely conceded that each one of the acts and sentiments mentioned involves some degree of criminality. It would still remain true that not even for the most clearly acknowledged offences can punishment be inflicted by a bill of attainder, or by legislation coming after the act done. And the question remains whether the intended and necessary operation of this 3d section is to inflict punishment upon any citizen, and particularly whether it inflicts it upon the plaintiff. If it does this, it imposes pains and penalties on him. This is what constitutes, in the view of the Supreme Court of the United States, a bill of attainder. If the section under examination does this, no artifice in the phraseology employed, no ingenuity in the contrivance by which the penalty is inflicted, can disguise the nature of the act, or save it from the consequences of the constitutional prohibition.

By reference to the criminal law of Missouri, already cited, we see that the disabilities, deprivations, and forfeitures, which are among the pains and penalties of a judicial attainder for felony, are the same with those which by the 3d section of article 2 of the new Constitution are inflicted summarily, without trial and without evidence, upon all who have ever done any of the acts or thought any of the thoughts enumerated in that section. This 3d section does not speak of those who hereafter may act or think in this obnoxious manner. If it did, it would be uncertain who would be included in the penalties of the section, the conduct in respect of which the penalties were denounced being future, and therefore contingent—something that might occur, or might not. But, referring as it does to all who have already done any of the acts mentioned in this section, it is clear that it provides the means of designating each member of an existing class. The section contemplates all the citizens of Missouri coming within a certain description, the terms of which

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are definite, and pronounces a sentence of deprivation and forfeiture against every man in the class thus ascertained. The legal effect of this section, then, is precisely what it would be if, instead of furnishing the means of enumerating and naming every man in this class, it had actually enumerated and named each one of them—as if the name and addition of every person comprehended in the description of the class had been set forth in the bill. No one can doubt that it is practicable to make such a list. Indeed, secs. 4 and 5 of the same article do actually require such a list to be made. I ask attention to this feature of the section. It ascertains those citizens of Missouri who are the subjects of the sentence of forfeiture and deprivation which that 3d section declares. When I come to consider the only defence which I have yet heard for this atrocity, I shall have something to say respecting the difference between such a list and a list of those who, before this section was adopted, were by existing laws disqualified from voting. At present, I proceed to consider the meaning of the operation of this section in respect of the class with which it deals. I think I have demonstrated that we are at liberty to treat the section as if, instead of the one description of the parties disfranchised and so punished, another equivalent description had been used. If a deed, a will, or any legal instrument, defines a class with such certainty that the definition necessarily includes A, B, C, D and E, and excludes all other persons, it must receive the same construction precisely as if, instead of the definition adopted, it had by name enumerated the individuals A, B, C, D and E. It cannot be necessary to pause on this point. If the children of certain parents are mentioned in a deed or will as the donees of certain property, this description will have precisely the same construction as if the same provision had been made for them by their individual names. It is true we are not familiar with the designation of particular families as the selected victims of political rancor, clothed in legal forms. Let this section stand, and we may soon become mournfully conversant with every devilish contrivance which the malice of factions, alternately gaining the ascendant in the State, can in the hour of triumph inflict upon their defeated adversaries. History has warned us (can the warning be in vain?) against the atrocities which under such circumstances flow “not less from the bitterness of retaliation than from the merciless policy of fear.”

This 3d section, then, is to be regarded by the court as if,

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instead of discriminating against the class at which it is directed by the description adopted, it had designated by name every individual comprehended within that description. It can make no difference whether the number of such individuals be great or small. Undoubtedly, in this respect, this bill of attainder challenges attention. Prior to this production, the act of the Irish Parliament attainting between two and three thousand men, women and children, in 1689-90, was nearly or quite without a parallel. Many more than that number are disfranchised by this bill of pains and penalties. But the number is of no consequence; whether fifty thousand, or five thousand, or five hundred, or five, the number of the victims will not alter the character of the act. And whatever might have been said against it if it had designated a few persons by name, may be said against it now when it disfranchises by a definite description a large part of the loyal men of Missouri. It will not, I hope, be forgotten, that in May, 1861, the plaintiff was in armed hostility to the Government of Missouri, then administered by traitors; and for this act of eminent loyalty to the Union he now stands disfranchised by this "new Constitution."

The section may then be read thus: The following named persons, that is to say, Francis P. Blair, Jr., &c., shall not, nor shall any one of them be deemed a qualified voter at any election held by the people of this State, under this Constitution; nor shall the said Francis P. Blair, Jr., &c., nor any of them, be capable at any time hereafter of holding in this State any office of trust or profit under its authority, &c. &c.

This is nothing but a legislative sentence, depriving certain enumerated individuals of certain rights, privileges, liberties, and franchises, which they enjoyed at the passage of the bill. This, however, is the very definition of a bill of pains and penalties, which, as the Supreme Court of the United States declared, is included in the more general prohibition of a bill of attainder; a bill of attainder being the general term embracing all legislative sentences which may be inflicted as the punishment of felony.

But we have heard from the demurrants, this day, a defence of this section, which declares that it is not a bill of attainder, nor a bill of pains and penalties, because it neither inflicts capital nor any other kind of punishment; that punishment is the recompense which the law awards to crime, and here there is no crime; punishment is the result of a conviction for crime, and here there is no conviction, not even a

trial; that the words "crime" and "punishment" are not to be found in the section under consideration, and therefore that the court is not at liberty to say that the minds of its framers had any idea corresponding to these terms; that the section is upon its face a definition of the qualification of voters in Missouri, and that the courts cannot take any view of it, nor give it any interpretation, inconsistent with the declared object.

If these positions are tenable, there is no possibility of defining by the most careful language any principle, right or liberty which may not be set aside the next moment by chicanery. Arguments like these seem, to the counsel for plaintiff, to outdo all that a lively imagination ever imputed in works of fiction to the most impudent of prevaricators. The extravagance of a verbal jugglery imputed by Swift, in his "Tale of a Tub," to the three brothers, who sought to find in their father's will a warrant for the accomplishment of their unruly desires, are absolutely brought to shame by this example. The sharpness of the satire, directed in that instance against the perverse ingenuity and utter shamelessness of sectarian zeal, has been objected to, as violating all probability. But here we have in broad daylight, in the case of a legal argument on a question of the utmost gravity, a serious attempt to do no less violence to plain language, to criticism and common sense, than the caustic Dean, in his contempt for those who heat their tempers and befog their intellects in the conflict of theological controversy, imagined it to be possible for the human mind to be betrayed into perpetrating. It is necessary to remember all these circumstances; we are else in danger of supposing that the attempt is not—cannot be—seriously made.

Being convinced, however, that this is really the ground taken by the defendants, it is incumbent upon us to examine it, and to submit it to those tests which logic and authority may furnish. It is felt, indeed, that to state such an argument (?) is the best means of refuting it; and that little remains to be done, or is possible to be done by any elaboration of the subject, to add to the discredit of what is, almost in its very terms, an affront to the understanding of mankind. But it is permissible to consider in detail what the pretensions of the demurrants amount to, and what are the "qualifications for voting" fixed by the new Constitution of Missouri.

In the first place, parties named in this bill of attainder,

or described on it so accurately as to dispense with that particular description which is effected by giving the name of the individual, were at the time of the adoption of this Constitution in the enjoyment of the privilege, right, franchise and liberty of voting, of holding office and performing various other functions belonging to them as free citizens. Life and liberty are the chief of the rights, liberties and privileges which appertain to a citizen of a free State. His liberties, his franchises and rights as a citizen—his “place in the commonwealth”—these are what give grace to his existence and make his condition preferable to that of the subject of a despotism. Take away these, and you will reduce him to that degraded rank. To say that they are taken away by sec. 3 of Art. II. is merely to quote its provisions. It is not denied by the demurrants that it does effect this. But it is said that the things taken away are mere political rights which the State may give, withhold or reclaim at pleasure; that a man can have no property in such things, and that for the abrogation of them he can have no remedy in a court of law. We say that to be deprived of these things or any of them is a heavy punishment. That not to have them is not to be free, and that when they are taken away from him who once possessed them, that person is degraded and punished by the deprivation; that punishment is of two kinds, corporal and not corporal; that of the latter kind are “fines, forfeitures, suspension or deprivation of some civil or political right.” “They are (4 Blacks. Comm. 7) the evils or inconveniences consequent upon (conviction of) crimes and misdemeanors.” The learned author is speaking of punishments as known to free and constitutional governments: the evils and inconveniences, the penalties, annexed to crime judicially ascertained. But the idea entertained by the demurrants seems really to be that, if a government abuses power to such a degree as to inflict pains and penalties for that which is no crime, and to do this without any judicial inquiry as to the existence of that in respect of which the pains and penalties are inflicted, then the pains and penalties cease to be a punishment. It is said that punishment is that which the law ordains, after trial and conviction, against one who has committed a crime, and the monstrous notion seems to prevail that, if the penalty is visited upon an individual with the forms, but in violation of the spirit of law; or if it be imposed without trial; or if it be done after an acquittal, in-

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stead of after a conviction ; or if it be inflicted not for the commission of a crime, but for the doing of something not criminal by law nor forbidden by morality—something which is neither *malum in se*, nor *malum prohibitum*—it is maintained, I say, by the counsel for the demurrants that all these hideous aggravations of the guilt of the usurpers of governmental powers may be pleaded by the offenders in bar of the accusation for the less grievous offence.

It is very difficult to treat this argument calmly. Are “political rights” something so shadowy and valueless as not to be worth the attention of courts of justice? Are they so minute and trifling as to be beneath its dignity? If they are, it is at any rate useful for us to be assured of the result ; for such knowledge will, at lowest, lead to a correction of our estimate of American freedom, and to a reform in the language of panegyric we are accustomed to employ when speaking of our institutions.

The man who, six years ago, would have expressed a doubt of the reality of the rights, franchises and liberties of a citizen of this State would certainly have incurred the reproach of eccentricity. If he had suggested that these rights, franchises and liberties reposed on a foundation less secure than that of the freemen of England in the days of King John, he would have been regarded with a mixture of incredulity and derision—of derision, I say, for such extravagance could not at that day have moved any one to serious indignation. He would have been told that if ever there was on earth a government, the foundation and elementary principle of which was the sacredness and inviolability of popular rights and privileges, that country was the United States ; that if there be one of these rights more important and more sacred than another, it was the right of every freeman to have a voice in the selection of the depositaries of the powers of government ; that nearly equal to this in importance was the right of being himself such depositary, should a majority of the constituent body so will ; that whoever and whatever invaded rights like these, was a far deadlier enemy to the common weal than he who enroached upon the rights of tangible, real and personal property ; and that if we were not like children, cheated with the semblance of liberty, while deprived of its substance, we were either in the enjoyment of a form of government which gave effectual protection to such political rights, or we would instantly, without the de-

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lay of a moment, upon being suspicious that our Government was defective in making this provision, betake ourselves to the reformation of it in this vital particular.

All this and more would have been said. The truth is that political rights are as much the property of the citizen as his house or his land, and equally under the protection of the law, and until very lately none thought of doubting this. It is only by very perverse industry that any confusion of ideas on this subject has been rendered possible.

It is obvious at a glance that no one in a commonwealth can be, as a citizen of that commonwealth, humiliated and degraded by the operation of a law which really presses equally on all alike. A sumptuary law may be very hurtful to the general prosperity, and may, in its application, be particularly inconvenient to certain individuals. It may be very unwise, but it can hardly be said to be degrading if all are subject to it equally. If, however, it be so framed as to discriminate against a portion only of the citizens of a commonwealth, then, although in its preamble it be declared to be of general application, it will be a degrading and humiliating law.

In like manner, it may be doubted hereafter as it has heretofore been doubted, whether it is wise to confer upon all citizens the fulness of participation in the government of the State. The age at which competency for the exercise of political rights accrues, is, beyond all doubt, to be fixed by the will of the State. The qualifications, intellectual and pecuniary, which a citizen must possess in order to have the enjoyment of full political franchises may also be established by the State and changed at its pleasure. Every one can see, that by reason of such regulations operating equally on all, and so being an injurious discrimination against none, here is a standard fixed, and every citizen is invited to bring himself up to its requirements. It is the essential of all such qualifications that they are, humanly speaking, within the reach of every man possessed of a sound mind.

When, instead of fixing a qualification to which all men may attain, a class is accurately defined, and every man of that class hopelessly disqualified, the oppressive tyranny of the proceeding is only aggravating when its victims are told that they do not suffer any punishment, for the sole and sufficient reason that the word "punishment" is not used in the sentence which consigns them to degradation and ruin. They are not killed, but simply disqualified to live; they are not

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deprived of any property, but simply rendered incapable of acquiring or holding any property except in trust for the spoiler.

It has already been said that, when a law, fixing qualifications for the right of suffrage, or for holding office is made, it always fixes a standard, and to this standard all of the free male citizens of a State may attain. A certain age is generally required. All who live long enough will be sure to fill this condition. A property qualification may be annexed, and all who are thrifty enough to make the necessary accumulation are within this requirement. The list of those then, who are, by a law fixing the qualifications of voters, at any time excluded from the polls, is perpetually changing. Men who were too young to vote last week, are now of age; those who had not then lived long enough in the State or county, have now completed the required period. No such changes occur, or can occur, in the list of those who are excluded by the 3d section of art. 2. By an inflexible sentence they are pronounced unworthy of the rights of free citizens; and on the list of the proscribed they must remain until death relieves them of the degradation.

It is far from being a pleasant reflection that a citizen of the United States, defending himself against arbitrary power, is at this day driven to the great charter of the liberties of Englishmen, extorted from the King who ruled the mother country in the twelfth century, for a definition of his political and personal rights and an acknowledgment that they are indeed his property. But so it is, and there may be something salutary after all in the necessity. Lawyers know how destructive of sound law is the ignorance which knows nothing of the wisdom of the past, as well as the arrogance which, springing from this ignorance, disdains to profit by the thoughts and experience of those who have passed through trials not wholly unlike our own. If those who are placed in stations of trust and power in this country could be so far instructed as to become sensible of the disadvantage they sustain by their ignorance of the lessons of history, many outrages, many follies of a most costly nature, might be avoided. If, in examining into the tenure and qualities of the liberties of freemen, which we have so long claimed to hold by inheritance, and to have enlarged by our own struggles until there is no other nation the people of which enjoy them in so full a measure, we are led to the discovery that we have narrowed rather than extended that

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inestimable possession, and are in danger of losing it altogether, we may be quickened and prompted, while it is yet time, to the performance of our duty—the reassertion of our ancient birthright, and the casting off of a yoke to which our necks are not yet accustomed. If the discovery of our danger teaches us a lesson of humility and imposes some restraint upon the vaunts with which we have so long wearied all ears, of our monopoly of that, in respect of which we prove to be so nigh utter destitution, it may be of material advantage to the national character, and may prepare us for the recovery of our ancient birthright, which was not “un-chartered freedom,” but rational, constitutional liberty, under the sanctions of august and sacred law.

The language of the Great Charter is: “No freeman shall be taken (arrested), or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will deny to no man, we will delay to no man either justice or right.”

Such was one chapter of the great charter. Let no one imagine that this was an enlargement of the ancient liberties of Englishmen. The profoundest antiquarians, the ablest jurists of that country have declared that this charter contained very few new grants, but was merely declaratory of the fundamental laws, privileges and liberties of England; and Lord Coke especially says this of the paragraphs quoted. This is one of the most pregnant passages of the whole of that remarkable instrument, and a commentary upon it would occupy more time than I can now bestow. A glance at its tenor is all that is permitted.

In the first place, it is noteworthy that the “liberties” and “free customs” of every free man were put in the same rank with his life and land. In the second place, these “liberties” and “free customs” were very different from personal liberty; for freedom from arrest and imprisonment had already been provided for before we come to the disseisin of “his freehold,” or “liberties,” or “free customs.” And by the word employed, the most emphatic possible sanction is given to the idea, that in such privileges and liberties the freeman had a property, his right to which was as indefeasibly sacred as his title to his land. In the third place, arbitrarily to inflict upon any free man any of these pains and

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penalties was, in the energetic language of the charter, to destroy him. In the fourth place, these pains and penalties, which could not, without subverting the fundamental law, be inflicted arbitrarily on any man, may all be inflicted "by the legal judgment of his peers, or by the law of the land;" that is, by due process of law, annexing penalties to crime after regular conviction.

It is hard to believe that any one who has read this charter can doubt that all these things which are mentioned in it as inflictions not to be arbitrarily imposed, but only annexed as the penalty for crime, after regular conviction by due process of law, should be regarded as punishments in their own nature; and still more difficult is it to understand how such a one can suppose that, if the penalty be inflicted without trial, it is thereby deprived of its sting and bitterness, and becomes no punishment at all.

Such was not the opinion of Lord Coke. It is worth our while to listen to what he says of the scheme of proceedings which found favor with the late Convention of Missouri, of which the counsel for defendant was a member. After explaining the significance of the words, "the lawful judgment of his peers, or the law of the land," and particularly enforcing the view that by "the law of the land" is meant "the due course and process of law," he speaks of the infliction of punishments arbitrarily and without these sanctions. He speaks of these things as being the ear-marks of tyranny and despotism. It never seems to have occurred to him that the absence of trial and the innocence of the victim made punishment change its nature and lose its sting; but he speaks of it when thus inflicted as being the most hateful spectacle on earth—as meriting the execration of all mankind, and particularly all upright ministers of the law. I cannot forbear to quote one passage from p. 55 of the 2d Institute of Coke:

"The philosophical poet doth notably describe the damnable and damned proceedings of the Judge of Hell,

*'Gnosius hic Radamanthus habet durissima regna;  
Castigatque, auditque dolos, subigitque fateri.'*

And in another place:

*'Leges fixit pretio, atque refixit.'*

First, he punisheth; then he heareth; and lastly compelleth to confess; and makes and mars laws at his pleasure; like as the Centurion in the holy history did to St. Paul.

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For the text saith : ‘ *Centurio apprehendi Paulum jussit, et se catenis ligari ; et tunc interrogabat quis fuisset et quid fecisset.*’ [The centurion ordered Paul to be seized and loaded with chains, and then he inquired of him who he was and what he had done.] But good judges and justices abhor these courses.”

In the case of Ashby v. White and others (Lord Raymond’s Reps. 938), after verdict for the plaintiff, the judgment was arrested by the Court of Queen’s Bench by Justices Gould, Powys and Powell. The action was brought against the returning officers (who fill the same place in England that judges of election fill in this State), for refusing to receive the vote of the plaintiff. The case is a most interesting one.

Gould, justice, was of opinion that the action was not maintainable ; 1st, because the returning officers were judges of the qualification of voters ; 2d, because the plaintiff’s privilege of voting is not a matter of property or credit, so that the hindrance of it is merely *damnum absque injuria*. \* \* \*

Justices Powell and Powys concurred, mainly on the third point. Lord Holt dissented. “It is not to be doubted,” he said, “but that the Commons of England have a great and considerable share in the Government and a share in the Legislature, without whom no law passes ; but because of their vast numbers, this right is not exercisable by them in their proper persons ; and therefore by the Constitution of England it has been directed that it should be exercised by representatives chosen by and out of themselves ; and this representation is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs ; and these are the persons entitled to represent all the commons of England. The election of knights belongs to the freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from the freehold than the freehold itself can be taken away.” \* \* “The right of election is an original right incident to and inseparable from the freehold. As for citizens and burgesses, they depend on the same rights as the knights of shires, and differ only as to the tenure, but the right and the manner of their election is on the same foundation.”

After examining the various tenures of the different cities and boroughs, he proceeds : “Hence it appears that any man that is to give his vote on the election of members to serve in Parliament, has a several and particular right in his pri-

vate capacity as a citizen or burgess ; and surely, it cannot be said that this is so inconsiderable a right as to apply that maxim to it, '*de minimis non curat lex*;' a right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur in the making of laws which are to bind his liberty and property, is a most transcendent thing and of an high nature, and the law takes notice of it as such in several statutes." \* \* "The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege that it is a great injury to deprive the plaintiff of it." \* \* "But my brother says we cannot judge of this matter because it is a Parliamentary thing. Oh ! by all means, be very tender of that !" \* \* "To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation." \* \* "If it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us."

Such was the opinion of Lord Holt. He was overruled by the three Associate Judges, but most fortunately a writ of error was taken to the House of Lords, and the judgment of the Court of King's Bench was reversed by the vote of fifty Lords to sixteen. Trevor, Chief Justice of the Common Pleas, and Baron Price, of the Exchequer, were of opinion with the three Judges of the King's Bench. Ward, Chief Baron of the Exchequer, with his associates, Bury and Smith, agreed with the Lord Chief Justice Holt. Tracy, Justice, agreed with Holt on the main point, but differed on a point of pleading.

When this case was argued in the House of Lords, Holt, Chief Justice, said, addressing those in favor of affirming the judgment: "The plaintiff has a particular right vested in him to vote. Is it not then a wrong and an injury to that right to refuse to receive his vote ? \* \* This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage but what is pecuniary." \* \* "Let all people come in and vote fairly. It is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him (the defendant) pay well for it. It is denying him his English right ; and if this action be not allowed, a man may be forever deprived of it.

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It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make."

This case is cited at length in order to combat the notion that the right of suffrage is of slight estimation in the eye of the law, and is not regarded as being of the sacredness that hedges and protects tangible, real and personal property. This was the opinion of Gould, Powell and Powys, Justices of the King's Bench (or rather of the Queen's Bench—for the cause was originally tried in the second year of Queen Anne). But the opinion of Holt to the contrary was supported by a majority of the judges of the three courts, and by more than three-fourths of the House of Lords.

Whoever is disposed to make light of this case as an authority for the only proposition in support of which it is cited, viz., that the right of suffrage is eminently a thing belonging to a free American man—that it is his property, something which is his own, the infringement of which debases and degrades him, and is a deprivation of that which makes the principal dignity of his condition—must be prepared to maintain these propositions also, viz. :

1. That the freedom of an American citizen rests on a less assured basis than that of an Englishman.

2. That popular rights are of less weight in a popular government than in an oligarchical.

3. That the right of suffrage, if possessed by a man in virtue of being a freeholder, or a member of a borough in England, is more inviolable than if it be held as an incident of free citizenship of such a State as Missouri.

If these things be true, the authority of the case just cited is unquestionably very much shaken. If they are not true, it is not perceived how it can be denied that a man's political franchises are as inviolable as his purse or person.

Let it not be imagined—let no one pretend to imagine—that the plaintiff denies the power of the people of Missouri to alter the qualifications for voters at pleasure. What is denied is the power of inflicting punishment on obnoxious individuals by bill—that is, without a trial and without a crime, under pretence of fixing such qualifications. If this is done—if this is both attempted and accomplished—it does not matter a straw under what specious disguises the offence seeks to hide its true character. If, while the general qualifications of voters remain the same, a certain obnoxious class of persons be singled out, stigmatized, deprived of the great privilege to choose such persons as are to bind a man's life

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and property by the laws they make, and made incapable of becoming themselves the depositaries of any public trust ; and if courts of justice are to be told, and not only that, but are bound to believe against the evidence of their understanding that this is not a punishment because the word is not used throughout the section, though the thing is there in all its bitterness and all its infamy, then I can no otherwise express my sense of our political and social situation than by saying that we seem to be under the weight of a horrible nightmare ; a state in which, in view of the most menacing dangers, some miserable impotence prevents us moving a finger to save or uttering a cry to warn.

Disfranchisement, deprivation of all political rights, no punishment ! To be made a Pariah no degradation ! To be stripped of all which makes us the equal of our fellow-citizens no penalty !

It is this last named consideration that the counsel for the defendants seek industriously to keep out of view. He talks of the power of the State to fix the qualification of voters. We admit this power. General laws operating equally on all are the appointed means of fixing these qualifications ; and however such laws may restrict the suffrage, to however small a class they may confine this inestimable privilege, still, if general and equal in their operation, they escape the objection of being degrading to any individual. No person can say of any other that such a law was framed for his exclusion. He may be for the time excluded by it, but a change of circumstances may at any moment remove the exclusion by conferring on him the necessary qualification. For this change of circumstances he may labor and wait ; but if the individual person be disfranchised, all such labor and patience are hopeless. Indeed, the whole pending controversy is decided when we see that the third section is really a disfranchisement of individuals, and that the disqualification (if we must use that word) attaches to them as individual persons, and not to the circumstances in which they stand. If it be said that when a man is deprived of his political rights upon conviction for crime, the disqualification is personal in that case also, we reply that it is so undoubtedly, and for the very reason that it is then inflicted as a punishment. I am really afraid, your honors, that I am likely to neglect my duty here. The defendants' counsel says that certain pains and penalties, disqualifications, disfranchisements, &c., are no punishment at all—partly because the things taken away are merely

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political rights and privileges, and partly because the word punishment is not used in the sentence of deprivation, and he argues as if he at least was entirely convinced of what he says, although he couples this debasement of popular rights with a claim of omnipotence of popular powers. For my part, the mere statement of the proposition is so revolting that any attempt to demonstrate its futility wears the appearance of an anti-climax; and the language I employ seems as weak as would be any ratiocination used to make plainer the proposition that two and two make four.

But I cannot forbear here a reference to a passage of history, which to my mind is of singular appositeness. In a question like the present, the political history of former ages may contain more instruction than will be yielded by the decision of courts of justice; and the decision pronounced by the historian upon the acts of men in times past, under circumstances similar to those of the present day, may enable us to anticipate the sentence which future ages may give upon events now passing into history.

It is known that in the reign of Charles II. proceedings were set on foot to forfeit the charters of most of the principal cities and towns of England. The privileges and immunities enjoyed by those who were freemen of a city or borough were a great obstacle to the designs entertained at that period by the Court party. It was felt that an immense advantage would be gained if the charters of the municipalities could be forfeited. With a view to this, the Crown, by virtue of the power then held by it of displacing any judge at pleasure and appointing his successor, purged the bench of every judge who from his learning and integrity was supposed not to be likely to prove a tool of arbitrary power; and then writs of *quo warranto* were issued against the several corporations. But in England, in the worst of times, there has been some reverence for law, and some hesitation to commit open outrages upon it. So soon as the actions were begun, the creatures of the Crown began to approach the municipal magistrates, and advise them to surrender their charters without a trial to the Crown, trusting to the clemency of the King to grant them new charters, not so favorable indeed as the old, but far better than could be looked for if formal judgment of ouster were passed against them. This was the form of the solicitation. Both the monarch and his supple instruments, the judges, had a wholesome dread of the possible consequences that might ensue to them both in case of

a popular reaction such as had led to the Long Parliament, and they had no such disposition to push matters to extremities if it was possible to avoid that necessity by a compromise. Most of the corporations were persuaded to surrender their charters for fear of encountering still worse evils. Of course there were on this subject in each borough two parties; one of them in favor of surrendering the charters (these were mostly friends of the prerogative, or Tories), and the others opposed to this policy, mainly composed of Whigs. These things were done between 1683 and 1686.

In 1688 occurred the revolution that drove the Stuart dynasty from the throne of Great Britain. The first Parliament which assembled under the new monarch betook itself to the task of redressing some of the heinous wrongs of the preceding reigns. In this Parliament the Whigs had a majority. In an evil hour some of that party bethought themselves of a scheme, the accomplishment of which would, they thought, secure to the Whigs a permanent tenure of political power. They resolved to seize the occasion of the corporation bill for effecting this object. I proceed to quote the narrative of the heated party strife of the 17th century with the comment of a writer of the present day. [Ext. from Macaulay's *History of England*, vol. 3, ch. 15, pp. 467-71, large 8vo ed.]

I have quoted at length this interesting passage, considering it as I do most apposite and most instructive to ourselves, unless we have reached that point at which the lessons of experience are thrown away on men doomed to destruction and disgrace. There are many things in this narrative to arrest our attention. We read the history of the Whig party of 1690, written in 1855 by a Whig partisan. Assuredly, no one can suspect the historian of any tenderness for Tories. On the other hand, the thing which the Whigs of 1690 attempted to do is relieved of many features of aggravation which are branded indelibly on the whole work of the late Convention of Missouri. It was undoubtedly something which mitigated the blame we should otherwise attach to the intolerance of Sacheverell and Howard that these men stood in 1690 where they had stood in 1680. In the days when it was dangerous to oppose the Crown they had voted for the exclusion bill. We may imagine with what loathing and disgust such a motion as they made for the disfranchisement of the Tories would have been received by Whigs and Tories alike, had it come from any person whose hands were dripping with the blood of Russell and Sydney.

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Again, the forfeiture which was attempted by the corporation bill in 1690 was by no means so sweeping as that which we are forced to contemplate at home in our own days. There is a wide difference between disability to hold any borough office for seven years, and a life-long disqualification to vote or hold any office of trust in the whole realm, or to pursue many paths to subsistence. There seemed to be some proportion in the corporation act of 1690 between offence and penalty. Those who had contributed to the surrender of the old charter were disabled for seven years from holding office under the charter which that act restored. This was all; but this was enough to call for language of the most just and unsparing severity from the mouth of a friendly commentator. I call attention to the terms in which this act is characterized by Macaulay, who certainly, when he used them, was not writing in the interest of the opponents of this new Constitution, unless every writer of sense and integrity, whether dead or alive, may be said to have been engaged in such a conspiracy. He says the bill, as amended by Sacheverell, "retrospectively inflicted a severe penalty"—that it was "a retrospective penal law"—that it proposed to "punish" those at whom it was aimed—and that it was an attempt "to inflict on all these men without exception a degrading punishment."

Are these terms properly applied? "Impossible! The bill was a mere ascertainment of the qualifications for holding office in the different boroughs; that was its declared object. It did not intend to punish any one; that is clear, because the word "punish" is not once used in the bill. As for crime and its punishment, there is no hint at either in the act; and any one who can, in the face of demonstration like this, imagine that he sees either, must be a rank Jacobite and an enemy to the principles of the Whig party—(the 'good cause,' as it was sometimes called). No trial is provided for in the bill. How can there be punishment except for crime? Whoever dares to say that there is any such thing in it as penalty or punishment—that it is a bill of pains and penalties—that it is an *ex post facto* law—or that it is, in short, anything but what it suits its advocates to admit it to be, is an enemy to the Protestant succession."

Now, I ask if this is an unfair application to the bill of 1690 of the defence which has been attempted of the 3d section of article 2? If it is available for the last of these, is it not doubly so for the first? And does not every one see

at the first glance that if such a defence of the act of 1690 had been attempted, it would have been impossible to persuade posterity that those who made the effort were themselves the dupes of such drivel. Let no one be deceived. Let no one doubt that before the earth shall twice have completed the circuit of the sun, there will be on the part of all an equal incapacity to understand, to believe, that those who now on this ground, and on this ground alone, dare to defend the test oath of the new Constitution, could have been at once sincere and in their senses.

Nothing can be clearer than that if the Corporation Bill, as amended by Sacheverell, was a "retrospective penal law," then sec. 3 of art. 2 of the new Constitution is a retrospective penal ordinance. If the first inflicts a "degrading punishment," then, because the whole is greater than a part, the latter inflicts a punishment still more grievous and still more degrading.

But, if the 3d section of the 2d article of the Constitution is a penal ordinance, it is a bill of pains and penalties; if it is a retrospective penal ordinance, it is an *ex post facto* law; and so it violates the 10th section of the first article of the Constitution of the United States in both the prohibited particulars. The mode of ascertaining whether any of the class proscribed by the Corporation Bill were within its provisions does not appear. But, whatever it was, of this we can be quite sure: it could not be more foreign and repugnant to the genius of English law and the spirit of liberty, than the inquisitorial process which was adopted and made a substitute for trial and conviction in section 3 of Art. II. of the new Constitution, by the astonishing body of men, which, sixty-four in number, assembled in Mercantile Library Hall, in St. Louis, in the month of January, 1865, and imagined themselves clothed with unlimited power to feed fat the grudges of political rancor which they bore to a large majority of the best citizens of Missouri.

Again I say I feel that I owe an apology to the court for dwelling on what is so plain, when I call its attention to the fact that, whatever evil thing was done by the Corporation Bill of 1690 is done in greater measure by the Missouri Constitution of 1865. The latter excludes a large class from the right of voting at any election, from the right of holding any office under the State, or any municipal corporation in it; and from the right of pursuing certain callings by which men earn their living; and it does these things and more,

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not for seven years, but for all time—while the Corporation Bill only excluded its victims from a part, and a very small part of these privileges, and that only for seven years. If the Corporation Bill was penal, much more is the new Constitution penal.

It is important to look to the extent of the pretension made by the demurrants. It amounts to this or to nothing, viz. : That if a Convention (and by parity of reason a Legislature) does any act which it wishes to withdraw from judicial animadversion, and to screen from the objection of being violatory of some provision of the fundamental law of the land, all that is necessary is that the act should declare on its face, that its object and purpose are not to violate that fundamental law. If this declaration be made, no matter how impudently and how falsely, courts of justice are by means of it absolutely precluded from looking into the act itself in order to discern whether it really effects any of the things forbidden by the supreme law. All the mischiefs which the constitutional provision intended to prevent, can be effected by merely changing the phraseology of the act which works the mischief. If the act frankly declares its purpose—if it proclaims its intention to punish, by deprivation or otherwise, certain persons whom it ascertains by name or description, then beyond doubt it is a violation of the Constitution of the United States. But if it does not declare this purpose, and still more, if it denies this purpose, it may proceed to inflict the prohibited penal consequences; but by reason of the language of the act courts of justice will be precluded from saying that it is penal at all.

This is the position taken by Mr. Drake. It amounts to this or to nothing.

I consider the employment, by the defendants, of such a substitute for an argument as an admission of the highest importance. It is inconceivable that any one would adopt this defence of a position which he evidently greatly desires to maintain, if he had anything better to offer. And to what does this defence amount? It is simply that the judiciary shall shut the eyes and close the ears of their understandings, and only see and hear what *one* of the parties litigant before them may desire them to see and hear. It is a demand that the judiciary shall abdicate its functions as interpreters of law, and submissively accept from either of the co-ordinate departments (or from any litigant sufficiently noisy and imperious) the name and definition of an act

which is called in question. It is an abrogation of every constitutional safeguard, and every law which is expressed in language; which includes all laws and all constitutions. For, if it is only necessary to change the name of a thing in order to preclude an inquiry into its nature—and this is simply what the defendants claim—not one of the prohibitions in the Constitution of the United States, or of any State, and not one of the statutes in either, is worth a farthing.

If the name is everything and the substance nothing in an act of the Legislature, or an ordinance of a Convention, we can with little difficulty evade the operation of any constitutional prohibition. It may not be easy to overthrow it by any attack in front, but nothing will be easier than to turn its flank. Having got rid of the old rule—“*Quod prohibetur per directum, prohibetur et per obliquum*”—and having, in effect, construed it to mean that “if there be any difficulty which is insuperable by direct means, you can easily dispose of it by indirect,” the whole task is, as it were, ready done to our hands.

The Constitution of the United States forbids the infliction of capital or other punishment by bill; and it is, notwithstanding, desirable for some party or faction, having a temporary ascendant in the State, to prescribe and put to death a large class of its opponents. Clearly this cannot be done if death is called a punishment. But, if its name be changed, and it be called a reward, the constitutional prohibition will not be applicable to any wholesale murder which the Legislature may have at heart, and which it chooses thus to characterize. All difficulty disappears like magic. It would be competent for the Legislature (by the logic of the defendants) to make the change of names of their own pleasure and power. But, in this case, (*i. e.*, when death is in question,) they have actually good, or at least plausible authority in their favor. St. Paul said, “For me to die is gain;” and the same has been said of other Christians. Moreover, a heathen didactic poet has said, “That the wise man regards the close of life as among the rewards of nature.” Pagan and Christian authority may then be quoted for calling death a reward. Furnished with this superfluous support of a power already without bounds (in the article of miscalling things), let the faction designate by some certain description the persons whose continued existence on this earth threatens the permanent tenure of office by the faction.

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Let this class of persons, if mockery be considered a fit aggravation of their fate, be declared to have deserved well of the Republic. As a recompense for such conduct, let it be decreed that they shall receive a testimonial of the gratitude of the nation. Let it be the duty of some functionary (Jack Ketch, for example) to confer upon the persons named, or otherwise ascertained by description, in some public place, with appropriate ceremonies, that particular reward of which St. Paul and Juvenal spoke. Money has been called the root of all evil; property has been called a mere source of care. Nothing will be easier than by adopting these definitions, to perpetrate any act of spoliation, and call it a relief of the sufferer from pernicious evils. Even personal freedom has not always proved a blessing to its possessor; at any rate there have been men who have called it a curse. From personal freedom then, denominated as a curse, let certain political enemies, described as the favorites of the State, be delivered. Nothing can be simpler. Death, imprisonment and confiscation can be inflicted without stint, provided only those who frame the list of the proscribed are careful of the phraseology they employ. Let them beware of calling these things punishments, and let them be sedulous not to impute crime. Let them call spoliation, bounty; let them call death a reward, and imprisonment, a privilege. Courts of justice cannot (so runs the argument) look behind the professed intention of the act, and must be, dare not be otherwise, than blind as beetles and mute as fishes respecting its real nature.

No doubt, your honors, I seem to trifle with your time, and to make a dull jest of a solemn subject. I can give no excuse but what I have already given—I am replying to the only defence of this test oath which I have heard, and I have legitimately exposed the absurdities to which it leads.

I might proceed with the examination of almost every odious and oppressive law prompted by political hate or religious rancor, and show that the penal nature of them all may be denied with precisely the same propriety that the section 3 of Art. II. can be said to inflict no punishment. But I forbear such a trespass upon your time and my own powers of endurance.

If I do not mistake, I have made it plain, First, That the second article of the new Constitution of Missouri, under pretence of ascertaining the qualification of voters, actually promulges a sentence of severe and infamous punishment

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against a large and innocent class of the citizens of this State, who are described in the article as plainly as if they had been designated in it by name.

Second, That this 2d article is not only a penal ordinance, but a retrospective penal ordinance.

Third, That in so far as it is a penal ordinance, it is a bill of pains and penalties, that is, a bill of attainder; and in so far as it is a retrospective penal ordinance, it is an *ex post facto* law—and so, by both titles, it is a violation of the Constitution of the United States, and void.

*C. D. Drake*, for defendants in error.

NOTE.—The following are the portions of Art. II. of the Constitution of Missouri involved in this argument:

"SEC. 3. At any election held by the people under this Constitution, or in pursuance of any law of this State, or under any ordinance or by-law of any municipal corporation, no person shall be deemed a qualified voter who has ever been in armed hostility to the United States, or to the lawful authorities thereof, or to the Government of this State; or has ever given aid, comfort, countenance or support to persons engaged in any such hostility; or has ever, in any manner, adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending within their lines, money, goods, letters, or information; or has ever disloyally held communication with such enemies; or has ever advised or aided any person to enter the service of such enemies; or has ever, by act or word, manifested his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States; or has ever, except under overpowering compulsion, submitted to the authority, or been in the service, of the so-called 'Confederate States of America'; or has ever left this State, and gone within the lines of the armies of the so-called 'Confederate States of America,' with the purpose of adhering to said States or armies; or has ever been a member of, or connected with, any order, society, or organization, inimical to the Government of the United States, or to the Government of this State; or has ever been engaged in guerrilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as 'bushwhacking'; or has ever knowingly and willingly harbored, aided, or countenanced any person so engaged; or has ever come into or left this State for the purpose of avoiding enrolment for or draft into the military service of the United States; or has ever, with a view to avoid enrolment in the militia of this State, or to escape the performance of duty therein, or for any other purpose, enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or as a Southern sympathizer, or in any other terms indicating his disaffection to the Government of the United States in its contest with rebellion, or his sympathy with those engaged in such rebellion; or, having ever voted at any election by the people in this State, or in any other of the United States, or in any of their Territories, or held office in this State, or in any other of the United States, or in any of their Territories, or under the United States, shall thereafter have sought or received, under claim of alienage, the protection of any foreign Government, through any consul or other officer thereof, in order to secure exemption from military duty in the militia of this State, or in the army of the United States."

"SEC. 5. Until such a system of registration shall have been established, every person shall, at the time of offering to vote, and before his vote shall be

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received, take an oath in the terms prescribed in the next succeeding section.  
 \* \* \* \* Any person declining to take said oath, shall not be allowed to vote.

"SEC. 6. The oath to be taken as aforesaid shall be known as the Oath of Loyalty, and shall be in the following terms :

"I, A. B., do solemnly swear, that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same ; that I have never, directly or indirectly, done any of the acts in said section specified ; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic ; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding ; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the Government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it ; that I will support the Constitution of the State of Missouri ; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me."

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The question is simply whether the plaintiff was legally entitled to vote, at the election at which he offered to vote, when, by his own showing, he refused to take the Oath of Loyalty which the Constitution requires to be taken by every voter as a condition precedent to his exercising the right of suffrage. That is the formal question ; but within it lies another of vastly greater importance, viz.: Whether the People of Missouri have the right to declare in their Constitution who shall be voters, and who shall not.

May it please your honors, were I governed merely by my conviction of the necessity of an argument in support of the negative of the first, and the affirmative of the second of those questions, I would make none ; for, to make it might seem to imply that the Constitution of Missouri needs judicial sanction to be the Constitution of Missouri ; a proposition which I do not for an instant admit. But when I find able counsel boldly assailing the Constitution adopted by the People of this State, and attempting to establish the proposition that its provisions in regard to the qualifications of voters "are no constitutional provisions at all ; that they are binding on nobody and affect nobody's rights ; and that they are in violation of the Constitution of the United States, and mere nullities," I cannot hesitate to meet the attack with such ability as I possess. I approach the discussion with no misgivings as to the right, or as to the result.

May it please the court, the plaintiff's case, and the argument of his counsel, proceed upon a wholly baseless assumption as to the legitimate province of this court. Says Mr.

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Glover, "the judiciary holds in its hands the liberties of the people"; and he "solemnly invokes the judiciary to perform the duty for which it was created." This is the final invocation of his argument; and its closing words broadly intimate, that if the court fails to perform the duty of adjudging the sections of the Constitution under consideration to be nullities, "anarchy and bloodshed" may be the dread alternative. May it please your honors, we need not waste words just now upon the "anarchy and bloodshed" matter. Time enough to attend to that when it comes; when, no doubt, it will be attended to promptly, decidedly, and efficiently. What I am after just now is the position assumed by the gentleman, that "the judiciary holds in its hands the liberties of the people"; a position which I wholly repudiate. It is in no sense true, nor was it ever true, that in this or any other State of the American Union "the judiciary holds in its hands the liberties of the people." That it possesses the power to protect the liberty of the individual citizen, when illegally restrained, is most true; but by no inherent faculty, by no granted right, by no constitutional or statutory authority, express or implied, is it the custodian of the liberties of the people. They are the keepers and the defenders of their own liberties—which they define and guard in and by a Constitution adopted by themselves. As a necessary part of the machinery of government under that Constitution the Judiciary is organized, in part, to administer the fundamental law therein contained—not to set aside, abrogate, or annul it. Denying utterly any semblance of authority in this court, by its judgment, to cut out the very vitals of the Constitution to which it owes its existence—which is just what the plaintiff demands and his counsel urges—I am yet constrained to answer the elaborate argument of the latter.

In that argument all ages, all quarters of the globe, and all systems of government and laws are laid under contribution for material upon which to build the startling proposition, that the people of Missouri have no right to say, in their Constitution, who shall and who shall not vote; and that it is for this court, or the Supreme Court of this State, or that of the United States, to prescribe different qualifications for voters from those which the People of the State have themselves ordained. While I shall endeavor to meet that argument, it is not my purpose implicitly to follow its course. To do so, would not verify the old saying, that "the longest way round is the shortest way home." I shall take a shorter way to my con-

clusions; and shall endeavor, in reaching them, to walk in the light of this age and this country, not in the twilight of old Greece and Rome, or the darkness of mediæval Europe, or the gloom of Westminster Hall in its days of attainders, pains, and penalties. America sheds light enough upon her own institutions; and no other country's history or laws can much increase that light, in the grand realm where her people are working out the sublime problem of self-government, as never it was worked out before.

While I cannot but suppose it a work of supererogation to defend this demurrer, I am gratified that it devolves upon me to do so; for it presents the first opportunity I have ever known in a court of justice, to examine, down to the very corner-stone, the foundations of our system of popular government by masses of people organized into States; and to set forth the fundamental principles upon which the government of this State rests, and which seem not to have come within the range of Mr. Glover's vision, in his wide excursion through the realms of history, philosophy, politics, law, and rhetoric. There are such principles, and they are so plainly written down—make so clear and marked a way, that "wayfaring men, though fools, shall not err therein." I propose to bring them forth, and apply them to the case in hand, with undoubting confidence that they will vindicate the right of the people in this great matter.

It so happened that, in the course of his argument, Mr. Glover did—perhaps by accident—knock at the door which, had he opened it, might have led him in that clear and marked way; but I apprehend he did not fairly open it; but, discovering that the way to which it led was not the plaintiff's way, or his way, he "passed by on the other side." Near the close of his argument he encounters the question, "What is the State?" and affirms that none of those who contend that the State must have power to protect itself, will give any intelligible definition of what they mean by "the State." He then presents his ideas on that subject, and says, "The State of Missouri is a political organization based upon specific principles." May it please the court, I am constrained to confess—and perhaps should do so with humiliation—that this definition of the State does not come to my mind with as clear a luminosity as I could desire. There are several kinds of political organizations based on specific principles, but this definition does not say to which this State belongs. True, Mr. Glover adds, that "the State of Missouri

is a free State based upon the principles of liberty"; but still I do not find much light from that upon the subject under discussion. And yet, if your honors please, the question "What is the State?" happens to be the very one, above all others, most important to be rightly decided at the threshold of this debate; for as it is decided one way or another, shall we go right or wrong toward conclusions. Therefore, as I do not find in Mr. Glover's definition the clearness and exactness which appear to me necessary to a proper understanding of what the State is, I am compelled to attempt an answer to that question myself. I shall not at this point essay a definition. Matters of history and constitutional interpretation have first to pass in review; and to them I will now address myself.

Up to the year 1820 there was no State of Missouri. People lived upon a part of the wide-spread region which was afterwards included in the authorized limits of that State; but they were not the inhabitants of a State. There was a government over that region; but it was not the government of a State, but of a body of people constituting a part of the American Nation, and having that government provided for them by the Nation's authority. So far as they exercised any power of self-government, it was not of natural right, but under the licence of the Nation, granted by law. They had, for some purpose a corporate capacity, not inherently, but by the express authority of the Nation. In this condition of *quasi* minority they remained until the Congress of the Nation, by law, authorized them "to form for themselves a Constitution and State government." The only limitation imposed by Congress upon this power was, that the Constitution, when formed, should "be republican, and not inconsistent with the Constitution of the United States." If it fulfilled those conditions, there was no limitation or restraint upon their volition as to the organism and principles of the State they were about to form.

In pursuance of the authority of the act of Congress of March 6, 1820, the inhabitants of a certain defined portion of the Territory of Missouri elected delegates to a Convention to form a Constitution for the new State; and those delegates assembled in Convention, and formed that Constitution which was the fundamental law of this State until superseded by that now in force, and which this court is urged to assail with deadly thrust in its most vital part.

Here, then, we are at the very inception of the new State.

The People, through their representatives, were to form it. A *carte blanche* was before them, upon which to write such a Constitution as they pleased, subject only to the limitation before mentioned. Principles, organizations, agencies, rights, duties, privileges, enfranchisements, disfranchisements, were all in their hands, to declare, shape, and enforce in the new State, just as they saw fit. The Nation of which they were a part, and all its authorities, Legislative, Executive, and Judicial, recognized that right as fully, to every legal intent, as the people could have asserted it. There was, therefore, at the very birth of the new State, a universal recognition of the complete and absolute power of the people over every matter pertaining to the internal organization and government of the Republic about to be introduced into the family of States in the Union. That recognition has continued from that day to this.

The people, through their representatives, proceeded to form the Constitution which was to organize them into a State, and in its very first sentence defined what the new State was, in the following terms:

"We the People of Missouri, inhabiting the limits hereinafter designated, by our Representatives in Convention assembled, at St. Louis, on Monday, the twelfth day of June, one thousand eight hundred and twenty, do mutually agree to form and establish a free and independent Republic, by the name of 'The State of Missouri'; and, for the government thereof, do ordain and establish this Constitution."

Now, if your honors please, there are contained in this first sentence of that Constitution the following five propositions:

1. That the People of Missouri are the State;
2. That they become a State by mutual agreement;
3. That they as a State are a body politic;
4. That they as a State are free and independent; and,
5. That, for the government of themselves as a State, they ordain and establish that Constitution.

And here is the answer to Mr. Glover's nervous inquiries, hurled at imaginary adversaries, who, he intimates, are shirking the question "What is the State?" Says he, "Is it the militia? Is it the Governor or the Legislature? Is it the Union party? Is it the Radical party?" All of which bantering questions are quite impertinent; for the only true definition of the State, as furnished by itself, is—The people, organized by mutual agreement into a free, independent and self-governing Commonwealth. It cannot then be true,

as said by Mr. Glover, that "the State is a mere instrument for promoting the popular well-being;" for that is meaningless, if it do not affirm that the government of the State, that is, the magistracies to which "the powers of government" are by the Constitution "confided," is the State itself; when, in fact, it is but the agent or instrument of the State, namely, the people.

If, then, the people are the State, that fact furnishes a broad and impregnable foundation for their claim of right to protect the State from its enemies, by excluding them from all participation in its government. I fearlessly say that they have that right to the very utmost limit of its widest meaning. The State is no State without it. It can no more be questioned by any earthly authority than one man can question another's right to breathe.

Let us now see upon what principles the people organized themselves into a State, so far as their own rights and powers were concerned. Two are set forth in the "Declaration of Rights" in the Constitution of 1820, as "general, great, and essential principles of liberty and free government," which the people declared should be "recognized and established."

The first is—"That all political power is vested in, and derived from, the people."

The second is—"That the people of this State have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government, whenever it may be necessary to their safety and happiness."

These two great American political axioms have a powerful bearing upon the questions now before the court. If I mistake not, they are the upper and nether millstones to the plaintiff's case and the argument of his counsel.

Regarding them as axioms which are not and cannot be disputed, there grows out of them this important inquiry—what is meant there by "the people?" In ordinary parlance, when we speak of the people of a State, we may, in regard to some matters, mean the whole body of its inhabitants; but never so when we allude to the people in connection with the exercise of political power. Then, the mind instantly turns from the whole body of the inhabitants to that portion of them in whom is constitutionally vested the right to exercise that power. And who are they? To ask that question, is to bring at once to the mind of every man the only answer

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that can be given—that none of the inhabitants but qualified voters can exercise political power; for it is only through the ballot that such power is or can be exercised by the people. That this was the sense in which the words “the people” were used in the axioms above quoted, does not, to my mind, admit of a doubt. That Constitution, by its very terms, so demonstrates; for, while it affirmed the people to be the only source of political power, it cut off from any exercise of that power about eight-tenths of the whole body of the inhabitants of the State, comprised in the following classes, to-wit: persons of color, women, minors, unnaturalized foreigners, persons whose residence in the State was not at the time of an election of a year’s duration, and persons whose residence in a county was not at such time of six months’ duration. For the Constitution to affirm that all political power is vested in the people, and that the people have the sole and exclusive control over their Constitution, and at the same time to exclude eight-tenths of the inhabitants from the right to exercise any such power or control, and to confer the right upon the other two-tenths, leaves not the least room for questioning, that, by “the people,” in this connection, were meant the qualified voters of the State. Any other deduction is simply impossible.

Looking, then, at the body of the qualified voters of the State as in this sense “the people,” we come to inquire, next, how they were to exercise the political power residing in them? As I before remarked, they could do so only through the ballot. The periodical elections provided for by the Constitution and laws of the State, gave the occasions for its exercise; when eight-tenths of the inhabitants stood aside, while a majority of the rest wielded, through the elective franchise, the whole political power of the State. Thus, the very first act of the people of Missouri Territory, when they came to form a State government, was to assert their unbounded supremacy in that matter by excluding from any voice in the control of that government some eight-tenths of the entire population of the infant State.

Now, may it please the court, if the whole power to regulate the internal government of this State resided in the people, and was their “inherent, sole, and exclusive right,” it follows that chief among the matters over which they must necessarily exercise that power, would be the definition of what should constitute any inhabitant of the State a qualified

voter. Over that subject, above all others, it was their right to exercise control. And it was equally their duty; else there would have been exhibited the extraordinary spectacle of a State still-born, for the want of an original governing power. That they did in their Constitution declare the qualification of voters, of course we all know. In doing so, they exercised their declared right to say who should be voters, and who should not. They not only excluded those not included in the terms defining the qualifications of voters, but ordained positive disqualifications. Thus, both negatively and affirmatively, they wielded the power excluding thousands from the ballot-box. And now, I would ask, where was the limit to their power over this subject? Was it in the Constitution of the United States? Not in any possible way; for there is not in that instrument one word which gives the Nation power over the qualifications of voters in any of the States. On the contrary, that Constitution affirms the exact opposite, in that clause wherein it declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That there was nothing in the provisions of the first Constitution of Missouri on the subject of the qualifications of voters, which was inconsistent with the Constitution of the United States, was settled beyond dispute by the admission of Missouri into the Union, with the Constitution framed by her people in Convention. If, then, the Constitution of the United States imposed no restraint upon the power of that people over the qualifications of voters, what restraint was there? May it please your honors, you know, I know, the plaintiff knows, his counsel know, the whole people know, that there was not, and, in the nature of things, could not have been, any such restraint; that the people were as almighty over that subject as they could be over any; and that it was as absolutely a necessity that they should be so, as that you or I should have the right to protect the lives that God has given us.

The next point to be noticed is, that these great fundamental truths as to the political power of the people, were not adopted for a time, but for all time; that it was the will of the people that they should be "established"; that they ever since continued to constitute a part of the fundamental law of the State, and that they are absolutely unchangeable, save by the will of the people themselves. Every child born in Missouri, every immigrant into her borders, since that

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first Constitution took effect, came under the sway of those great truths. The people of Missouri in 1864-5 had the same "inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government," that the people had in 1820. And thus panoplied in the right which they themselves had asserted, and which the Nation had expressly assented to and affirmed by admitting this State into the Union, the people of Missouri, in 1864, inaugurated a movement for the exercise of that right; not by any unauthorized or revolutionary action, but by every sanction of law, and with a full and fair expression of the popular will.

Before adverting particularly to the details of that movement, let us for a moment glance at the circumstances under which it was made. It was early in the fourth year of the great rebellion that the movement was begun, under the sanction of law. Says Mr. Glover eloquently, in regard to that rebellion, "The nations of the earth, profoundly moved by the issue, ranged themselves on either side and watched with anxious solicitude the progress of the momentous struggle. Almost the whole family of lords, and kings, and despots—the friends of right divine, the advocates of arbitrary government—were upon the side of the rebellion. Openly or secretly they lent their favor to the enemy, and aided and comforted the insurrection, and earnestly prayed for the death of this Republic." May it please the court, with all respect for the learned counsel, I wonder that in this passage he should have referred only to the relations of the foreign world, in fact and feeling, to that rebellion, when he had been so familiar with the exhibition in Missouri of just such feelings and acts as he attributes to "almost the whole family of lords, and kings, and despots." Let me recall his gaze from those distant regions to our own State. In doing so, I beg the court to believe that I am not seeking an opportunity for declamation or display. Every word I shall utter is intended to have, and I hope will be seen by your honors to have, a direct connection with, and bearing upon, the main argument.

The outbreak of the rebellion shook Missouri from centre to outmost boundary. In a day, as it were, the whole framework of society was wrenched, distorted, and shattered. Where peace had reigned, war reared its bloody crest; where friendship had bound together, distrust and hatred separated; where law had regulated, anarchy bred confusion;

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where love of country had burned bright, the love of slavery, inciting rebellion, quenched it in blood; where the Nation's flag had been blessed and honored, it was cursed, spit upon, and trodden underfoot. Treason stalked abroad with defiant front, and in secret set its devilish enginery in motion. Falsehood, treachery, and perjury pervaded the whole social fabric. Few of the loyal could say with certainty who of their neighbors, or even their friends, was not infected with the virus of treason. Only traitors knew each other, always and everywhere: they enrolled themselves by thousands under the rebel flag, and turned their arms against their country and their former friends;—other thousands banded themselves together in secret organizations, to give aid, comfort, countenance, and support to the armies of traitors that were battering at the ramparts of the Constitution, and hacking at the golden bands of the Union;—other thousands dispersed themselves through every ramification of official and social life, to become the pimps and spies of the rebellion;—other thousands took to the bush, to waylay and shoot down unsuspecting patriots—to murder them in their habitations in presence of their wives and children—to set the firebrand to their dwellings, and make night lurid with flames which left them houseless, homeless, and beggared;—other thousands still, became the harborers, informers, guides, and purveyors of the bloody and merciless bushwhacker;—other thousands still, who, claiming to be American citizens, had for years exercised at the ballot-box the highest privilege of citizenship, when the struggling Nation was compelled to resort to a draft to recruit its wasted armies, flocked to the office of the British Consul to obtain a certificate of their being subjects of the British Queen, that they might not be compelled to fight for the flag under which they had voluntarily sought a home, and had lived in peace and prospered;—others, not so numerous, but still large in numbers, fled the State, to avoid being drafted into the army, for whose defeat and destruction they nightly prayed, and in secret labored;—other thousands, to escape service in the militia of the State, for the protection of our own soil and people, shamelessly enrolled themselves as “disloyal” or as “Southern sympathizers,” and so, in faith of final triumph of the rebellion, put themselves on record as traitors in heart. In short, there was hardly any form in which treason to country, treachery to friends, faithless to obligations, and disregard of all laws, divine and human, could be manifested,

that was not exhibited daily, for years, in this unhappy State. Could there be written a full account of all the crimes of the rebels of Missouri, and the wrongs and outrages inflicted by them upon her loyal inhabitants, during the four years of the rebellion, the world would shrink aghast from a picture which has no parallel in the previous history of any portion of the Anglo-Saxon race.

If it be asked, what has all this to do with the argument of the questions of law involved in this case? I answer, it has much. When a legislature adopts laws, contemporaneous history oftentimes sheds light upon the spirit and intent of those laws. And so, when the people of a State adopt great changes in their fundamental law, it is important, and sometimes indispensable, to consider the circumstances which led them to do so; that the world, the courts, and history, may know the *why* of proceedings which would otherwise be difficult of explanation. Mr. Glover in his argument says, in regard to the provisions of the Constitution now under discussion, "every principle belonging to the ordinary course of judicial proceedings known and practised in Missouri for more than half a century, has been thrown aside in framing these sections, with the cunning of ambitious, sharp-sighted and remorseless tyrants, or with the stolid and vulgar ignorance of Goths and Vandals." If the truth of this invective were in any fair proportion to its bitterness, it would be a stinging sentence to pass into history; but, fortunately, there is more of the partisan than the lawyer in it. It is a violent misrepresentation of the spirit which animated the Convention that framed the present Constitution of Missouri. Its intent was to intensify the colors with which he has sought to depict that Constitution as all that is intolerant and prescriptive, and its framers as all that is inhuman, remorseless, and tyrannical. To vindicate the Constitution and its framers from such injustice is not the province of the judiciary; nor is it mine to defend either here, except in so far as it is necessary to show that the Constitution is a legitimate expression of the will of the people, in the exercise of their indisputable right; is morally justified before God and man by the surrounding circumstances; and is not in conflict with any provision of that national Constitution to which it is unquestionably subject. To do this, the *intention* of the people in framing this Constitution is an important subject of inquiry, necessarily involving a view of the history of the State leading to their action in this respect; and he

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who looks at the Constitution without the light cast upon it by that history, is sure to misinterpret its spirit, and to slander, as vengeful, what was only designed to protect the loyal people of Missouri against their wily, bloodthirsty, and implacable foes.

Now, may it please the court, as has already been shown, one of the fundamental declarations in the Constitution of this State has always been, the right of the people to alter their Constitution "whenever it may be necessary to their safety and happiness"; and the motto of the State proclaims, "*Salus populi suprema lex esto.*" In obedience to this supreme law, and for their own safety and happiness, the people of this State began, through their delegates in Convention, in a little more than a year after the outbreak of the rebellion, to devise measures to protect themselves from the future domination of traitors. That the rebellion would finally be overthrown was inevitable; and that, when overthrown, its whole gang of Missouri officers, soldiers, guerrillas, bushwhackers, spies, pimps, aiders and abettors, would rally everywhere in solid force at the ballot-box, to secure there the power they had failed to obtain by war, was equally inevitable to the mind of any man whose knowledge of men was equal to that of a twelve-year old boy. It required but the smallest modicum of sagacity to foresee this; and, foreseen, the very instinct of self preservation would prompt the adoption of measures to guard against a humiliation so deep, an evil so incalculable in its extent and disastrous in its effects. That such measures should have been extraordinary, was the inevitable result of the extraordinary circumstances which evoked them. That a "test oath," "an oath of innocence," or almost any other kind of oath, should have been resorted to, was most natural, and perfectly justifiable; for, unless some constitutional barrier were interposed, there was no earthly power that could prevent rebels, fresh from southern battle-fields, from exercising, the very hour they came back, the franchise which, in every moral aspect, they had utterly and most justly forfeited.

But, if the court please, I will diverge a moment from the historical review upon which I had partially entered, to notice a point made by Mr. Glover, viz.: that he has been unable, after some research, to find any precedent in England or America for such a "device" as an oath of innocence of crime to enable a citizen to enjoy political rights. This assertion by him surprises me, as much as his reference to precedents

seems to me out of place. The right of the people to institute in their Constitution such an oath is wholly independent of precedents; it exists, though in the whole world such a "device" had never before been thought of. Unprecedented exigencies may well demand unprecedented resorts. Admit that no precedent for our test oath exists—has Mr. Glover found a precedent for the Southern rebellion, in its magnitude, principles, and aims? I judge not. Would it have been wonderful, then, if in this State measures were taken in reference to rebels, which had never before been resorted to against citizens? Would it not rather have been wonderful if they were not? But, if the court please, though the test oath prescribed here have no precedent in England, it is abundantly sustained by precedent in the United States, and in this very State. Let us look into recent American history, and see what there is there of a test oath "device."

1. I find that Congress, by an act passed June 17, 1862, provided that at any term of any court of the United States, the district attorney, or other person acting on behalf of the United States in said court, may move, and the court in their discretion may require the clerk to tender to each and every person who may be summoned to serve as a grand or petit juror, or venireman, or talesman, in said court, the following oath:

"You do solemnly swear, that you have not, without duress and constraint, taken up arms, or joined any insurrection or rebellion against the United States; that you have not adhered to any insurrection or rebellion, giving it aid and comfort; that you have not, directly or indirectly, given any assistance in money, or any other thing, to any person or persons whom you knew, or had good ground to believe, had joined, or was about to join, said insurrection and rebellion, or had resisted, or was about to resist, with force of arms, the execution of the laws of the United States; and that you have not counselled or advised any person or persons to join any rebellion against, or to resist with force of arms, the laws of the United States."

2. I further find that Congress, by an act passed July 2, 1862, required every person elected or appointed to any office of honor or profit under the Government of the United States, excepting the President thereof, before entering upon the duties of such office, to take and subscribe the following oath:

"I, A. B., do solemnly swear that I have never volunta-

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rily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement, to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto."

3. I further find that Congress by an act passed January 24, 1865, required this last oath to be taken by all persons practising law in the courts of the United States.

Here, then, may it please the court, are three instances in which this test oath "device" was resorted to by Congress before the present Constitution of Missouri was framed; and, as Mr. Glover in his argument continually parades before the court the "eighty-six crimes" which, by a most ingenious and extraordinary mode of computation, he has discovered to be defined in sec. 3 of art. 2 of the Constitution, it may be of interest to the court to be informed, as I take the liberty of informing it, that, by his mode of computation, the first of those oaths covers sixteen and the second twenty-two crimes.

Turning from the national precedents to those established by State authority, I find in the Constitution of Maryland, adopted in September, 1864, a test oath, or oath of innocence, prescribed to voters in the following terms: "I do swear that I have never given any aid, countenance or support to those in armed hostility to the United States, [and] that I have never expressed a desire for the triumph of said enemies over the arms of the United States." And that Constitution provides, as does ours, that "any person declining to take said oath shall not be allowed to vote."

May it please the court, the precedents which I have thus presented are enough to justify our test oath, if any such justification were needed. But, as I said before, the people of this State had a perfect right to institute this oath, had nothing like it ever before been conceived of. I present the precedents, because Mr. Glover said that he had been able to find none in England or America. And I hold that they are all the more forcible, for having been the offspring of the same circumstances which dictated the incorporation of the test oath into our Constitution. The rebellion brought them

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into being, as it did that. The rebels, therefore, have no right to complain of what their own acts brought about ; on the contrary, they should rejoice that the only inconvenience resulting to them from their matchless crime, is exclusion from office, from the ballot-box, and from certain employments and positions.

It will be observed by your honors, that Maryland was in advance of Missouri in adopting a Constitution prescribing a test oath ; but Missouri was more than two years in advance of Maryland in resorting to that "device," as I will now proceed to show. This will bring me back to the line of historical retrospect from which I just now diverged, and which is designed to present the circumstances which led to the adoption of our present Constitution, and thereby to explain and illustrate the intention of the people in its adoption. I call your honors' attention to the following sentences in Mr. Glover's argument :

"The Convention has directed the judges of election to disfranchise the citizen on sundry charges of treason and *ex post facto* offences, and suffer no one to demand accusation, or notice, or proofs, but to require an oath of innocence. May it please the court, at no time in Missouri since the existence of the State government has any department save the judicial exercised the powers employed by the Convention in those sections."

Is it, indeed, the first time in Missouri that the judges of election have been "directed to disfranchise the citizen on the charge of treason"? Is it the first time that they have been directed to "suffer no one to demand accusation, or notice, or proofs"? Is it the first time that they have been directed to require of the citizen "an oath of innocence"? Yes, says Mr. Glover ; but will his assertion obliterate history? What does that history say? It says this, that the Convention elected in 1861, wisely foreseeing that the time would come when "Price's army," and thousands of other Missourians in the rebel army, would come straggling back, whipped and disarmed, but still as bitter rebels in heart as ever, and as ready as ever to struggle for supremacy over Union men, determined to interpose, in advance, a test oath—yes, that atrocious "device" of a test oath—between such traitors and the ballot-box ; and, to that end, passed the ordinance of June 10, 1862, which required every voter to take an oath of innocence, at the time of voting, as a condition precedent to the reception of his ballot ; and every judge

and clerk of election was required, in addition to his ordinary official oath, to swear that he would not record, or permit to be recorded, the name of any voter who had not first taken that oath. True, the oath prescribed was not as wide-spreading or as searching as that of the Constitution; for, as to the past, it only required the party to swear that "he had not, since the 17th day of December, A. D. 1861, wilfully taken up arms or levied war against the United States, or against the provisional government of the State of Missouri"; but, so far, was it not a direction to the judges of election to "disfranchise the citizen on the charge of treason" committed after the day named? Did it not enjoin upon them to "suffer no one to demand accusation, or notice, or proofs"? Did it not command them "to require an oath of innocence"? All these things it did, just as much as the Constitution now does, except that the grounds of disfranchisement were limited to the act of taking up arms or levying war against the United States, or the provisional government of this State, after a certain date: a very feeble protection, since there were probably more dastard traitors in Missouri who had not taken up arms or levied war, but yet had been most active and efficient friends of the rebellion, than there were fighting Missouri traitors in the whole rebel army.

Now, if your honors please, what was that oath of June 10, 1862, but a measure of protection to Missouri's loyal people? Was it not the legitimate offspring of a well founded apprehension—nay, an assured and justifiable conviction—that the men who had renounced their homes here, and taken up arms against their country, would at some future day return, and demand to exercise at the polls the right of citizens, though they had, in every moral view, forfeited that right by their unequalled crime? Was it not, beyond all cavil, an exigency which made it "necessary" for the people to "alter their Constitution," for the protection of "their safety and happiness"? Did any one then hear that it was a bill of attainder, or an *ex post facto* law, or a punishment? Did any ex-Major-General, or any one else, then swagger up to the polls, and demand to vote without taking that oath? Did any lawyer then proclaim that that ordinance was "binding on nobody, affected nobody's rights, was in violation of the Constitution of the United States, and a mere nullity"? No such thing was seen or heard; but, on the contrary, the mass of the people accepted cheerfully the change in the Constitution contained in that ordinance, and for three years

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voted under it without ever discovering that they were thereby subjected to punishment, attainted, or deprived of their liberties. And why not? Was it not a test oath—an oath of innocence? Was there not in it, to use Mr. Glover's language, "a total absence of the *accusatorial* method so well understood and so much loved by free nations, and the substitution of the hated *inquisitorial* in lieu thereof"? In what, save its scope, does it differ from the present oath? Is not the principle the same in both? Did it not exclude from the ballot-box him who refused to take it? Is there anything charged by Mr. Glover upon the present oath (save always the "eighty-six crimes" which figure so largely in his argument) that might not have been charged also upon that? Let us see. He charges that the Constitution "assumes judicial magistracy"; that it "acts on the past"; that "the disfranchisement of a great number of citizens for treason was an object in view"; that it "changes the rule of evidence"; that in "providing that silence is guilt, it is only a special law, aimed at a class of persons—a legislative judgment against those persons"; that it "was enacted against domestic rebels, and is enforced in a summary manner, without indictment or trial by jury"; and that it "affects the punishment by creating a disability not incurred in the ordinary course of law."

Now, may it please the court, every one of these charges against the present oath might have been just as well made against the former, so far as they were concerned who had, after the 17th of December, 1861, wilfully taken up arms or levied war against the United States, or against the provisional government of the State of Missouri." Why were not such charges made against it? Simply because in the throes of the mighty struggle then progressing, all realized the great truth in our State motto, that the welfare of the People is the Supreme Law; and unprincipled politicians had not then scented the game, that, after the suppression of the rebellion, might be hunted down, by the aid of returned rebels, at the ballot-box. No loyal man then saw in it anything but a just and necessary measure of self-defence; and the judgment, conscience, and common sense of all good men approved the effort of that Convention to throw up even that slight breast-work against the reffluent tide of blood-stained traitors that all knew would sometime roll back upon Missouri's devoted soil. And such ought to be, and, in my opinion, must be, the judgment, conscience, and common sense of this or any other court before which the matter may ever come.

Unfolding further the political history of Missouri in those years of her bloody and fiery baptism, I come now to the facts connected with the formation and adoption of that Constitution which the court is asked to assail, by its judgment, in the very citadel of its life. That history is no unmeaning tale in its relations to this case, and to the argument now in progress. It pours a flood of light upon the intention of the Convention that framed, and the people that adopted, that Constitution. Never was a popular intention more clearly defined, or more unmistakable.

In November, 1862, the entire number of Senators and Representatives of the General Assembly of Missouri were chosen by the people, and assembled, in regular session, on the 29th of December following. They were elected by the voters under the ordinance of June 10, 1862. During that session an effort was made to pass an act authorizing the people to elect delegates to a Convention to revise and amend the Constitution; but it was not then successful. The General Assembly adjourned on the 23d of March, 1863, over to, and re-assembled on, the 10th of the succeeding November. The question of calling a Convention of the people was before the members and the public during the recess. At the adjourned session it was again brought before the Assembly, and, after full discussion and the most mature deliberation, an act was passed on the 13th of February, 1864, providing for calling such a Convention.

Some of the terms of that act require notice here. *First*—Its preamble recites that, “in the opinion of the General Assembly, the condition of affairs in the State demands that a Convention of the people be called to take such action as the interest and welfare thereof may require”; that is, an occasion had, in the opinion of that body, arisen, for the exercise by the people of the State of their “right to regulate the internal government and police thereof, and to alter their Constitution and form of government.” But the General Assembly, though of that opinion, did not, like the previous one, authorize the Convention to be elected without regard to the will of the people themselves;—but, *Secondly*, they referred that question to the direct vote of the people, at the general election to be held on the 6th of November, 1864; thus giving the people almost nine months to consider and discuss whether the Convention should be held. At that election they decided by a majority of 39,586 votes, that it should be; and at the same time elected delegates to repre-

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sent them in that body. The significance of this fact is in its connection with the point to be mentioned, *Thirdly*, viz.: that the act distinctly stated the particular matters which the Convention, when assembled, should consider and act upon; and is therefore to be regarded as the declaration by the people of the powers conferred upon the delegates, by electing them under it. Three matters were so stated; to only one of which is it necessary to refer in this connection; and I refer to it because it is the key to the spirit, intention, and meaning of the constitutional provisions now in question. I have pointed out to the court the first movement by the people, in 1862, to protect the ballot-box from the intrusion of traitors. The second was under this act, in 1864, and there was no mistaking its character; for the act declared that one of the distinct objects for the Convention's action was, "to consider such amendment to the Constitution of the State as might be by them deemed necessary to preserve in purity the elective franchise to *loyal* citizens." It was the well-considered, fixed, and unalterable purpose of the people, that those who had, in their country's great struggle for existence, shown themselves its enemies, should not thereafter have a voice in the government of this State. They boldly avowed that the control of that government rightfully belonged to the "*loyal* citizens." They denied that privilege to traitors, open or secret. They claimed the right to demand of every man who sought to exercise the right of suffrage, to clear his skirts of past participation in treason, and of acts or words manifesting his disloyalty to the country; just as the ordinance of June 10, 1862, required him to expurgate himself of past treason, manifested by taking up arms or levying war against the United States. This was indicated, not secretly or covertly, but by proclamation, as it were, from the house-tops, that the people of Missouri, in the exercise of their "inherent, sole, and exclusive right," were about to "alter their Constitution," because they deliberately and solemnly considered it "necessary to their safety and happiness." That it was necessary, no man of true loyalty could for a moment doubt. The moral sense of all patriots revolts at the thought of the government of a State being controlled by those who, in a war of unheard-of atrocity, had traitorously sought to destroy the Nation of which that State is a part; had ravaged the State itself; had waged cruel and relentless strife against its citizens, solely because they were loyal and faithful; had imbrued their hands for years in the blood of unoffending

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patriots; had made the land howl with the wails of widows and orphans of murdered loyalists; and yet, after all this, would, with the impudence of the arch-fiend himself, demand equal rights at the ballot-box with those whose hands were "guiltless of their country's blood," and who in every hour of that country's peril were found faithful and true to its cause.

Only one more historical fact needs mentioning in this connection. In probably fifty places in his argument Mr. Glover refers to the Convention that framed the Constitution, and always with words intended to cast opprobrium upon it. The impression is sought to be produced, that that body was but an assemblage of Neros, intent solely upon wielding with fanatical fury and implacable tyranny the power committed to them. The Constitution is continually referred to as if, like that of 1820, and the ordinances of the Convention of 1861-'63, it had been ordained and promulgated as the mere fiat of the body that framed it. And yet your honors know, and we all know, that the Convention was the mere framer of the instrument, and that it submitted its work to the people for their ratification or rejection, and that the People ratified it, after one of the fiercest contests ever known in this land. This is one more historical fact to which I referred, and it is a great fact in the case. The Convention was not only ordered and elected by the people, but its work was ratified by the people. The Constitution, therefore, is in every way, by every right, the work of the people, in the lawful, deliberate, and solemn exercise of their "inherent, sole, and exclusive right" to ordain and establish their own Constitution, in such form as they might deem "necessary for their safety and happiness."

May it please your honors, it is under that Constitution, so framed and ratified, that you occupy the bench this day; and you are asked—gravely asked, by your judgment, to defy and annul the will of the People, to blow up the foundations of the organic structure of their government, and to declare that the safeguards which they adopted "to preserve in purity the elective franchise to loyal citizens," "are no constitutional provisions at all; are binding on nobody, and affect nobody's rights; and are in violation of the Constitution of the United States, and mere nullities!"

If the court please, since the day this action was brought, King Solomon has ceased to be authority on a point concerning which he had, for near three thousand years, been held

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in high repute. As far back as the year 975 B. C., he declared, and wrote it down, and sent it to posterity, that "there is no new thing under the sun"; and posterity has accepted the saying as applicable, in a general way, to all times. Its charm is now broken—was broken when this suit was brought; for, beyond all peradventure, this suit is a new thing under the sun. I cannot say that, "take it all in all, we ne'er shall look upon its like again"; but of a certainty we have never seen its like before. Men, who were qualified voters, have sued judges of election for rejecting their votes; but nowhere on earth did any man ever bring such a suit, and tell the court in his declaration, complaint, or petition, that he was *not* a qualified voter, and showed himself not to be so when he offered to vote. Nor was it ever before known, that a man had the assurance to claim damages from judges of election for refusing to violate the express terms of the Constitution, by receiving his ballot, when he avowed, in offering it, that he was not a qualified voter, and would not make himself so. But, above all, never was it before known, that such a man based his action upon a demand that the court should adjudge to be "mere nullities" the provisions in the Constitution of his State, defining and regulating the qualifications of voters. The whole case stands out in bold relief on the page of jurisprudence, as the *ne plus ultra* of litigious impudence.

Such being its description, it is not surprising that the grounds assumed by the plaintiff's counsel to sustain the action should partake largely of its novel and extraordinary character. Though I have an assured conviction, that neither this court, nor any other before which the case may go, will ever for a moment seriously think of assuming to nullify and abrogate the vital provisions of the Constitution of this State, and to wrest from the people their inherent, absolute, unrestricted, and exclusive right to prescribe the qualifications of voters; yet a proper respect for the learned counsel for the plaintiff forbids that I should pass unnoticed the main positions taken in the argument, in support of his general position, that the constitutional provisions in question are "mere nullities." Those positions are but two, as follows:

I. "That sec. 3 of art. 2 of the Constitution is a bill of attainder, in the meaning of the Constitution of the United States, and being null and void for that reason, all other sections in aid of it are also null and void."

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II. That the said section "is an *ex post facto* law in the meaning of the Constitution of the United States, and being void for that reason, the other sections in aid must fall with it."

Let us examine the two positions. In doing so, I will use only definitions taken from Mr. Glover's argument.

*First.* As to the bill of attainder. Judge Story's definition of this, as cited by Mr. Glover, is as follows: "Bills of attainder, as they are technically called, are such special acts of the Legislature as inflict capital punishment upon persons supposed to be guilty of high offences, such as treason or felony, without any conviction in the ordinary course of judicial proceedings. If an act inflict a milder degree of punishment than death, it is called a bill of pains and penalties. But, in the sense of the Constitution, it seems bills of attainder include bills of pains and penalties."

Now, may it please the court, I do not desire to go beyond this definition, to make it clear that sec. 3 of art. 2 of the Constitution, under any fair and legitimate construction, has no single feature of a bill of attainder. Before proceeding, however, to discuss that point, I will briefly recall to the notice of the court the principles of construction which govern, or should govern, in every judicial interpretation of any law, be it merely an ordinary legislative act, or the more solemn provisions of a Constitution.

Your honors will at once recognize as a cardinal legal doctrine, that the object and the only object of judicial investigation in the construction of any legislative or constitutional provision, is to ascertain the intention of the legislature which framed the statute, or the body which ordained the Constitution. This is done principally, and usually exclusively, by the terms of the statute or Constitution; but there is no doubt that courts are sometimes justified in receiving light from the public history of the times, particularly in the case of a Constitution. In *Hamilton v. St. Louis County Court*, 15 Mo. 3, Gamble, J., in delivering the opinion of the court, said: "If there be in the Constitution any language of doubtful import, we must, of course, look to the circumstances and condition of the people, and to the history of the instrument itself, to find the meaning of the clause in question; but where the language is plain and intelligible, and consistent with all other parts of the instrument, we cannot allow ourselves to find, in any reference to facts out of the instrument, any authority for interpolating either a

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grant of power or a restriction upon power granted." I quote this passage, not because I am willing to admit that there is in sec. 3 of art. 2 any language of doubtful import as to its being a bill of attainder or not; but simply to show, that if there be in the mind of the court a doubt as to the import of that section in that particular, the court may "look to the circumstances and condition of the people, and to the history of the instrument itself, to find the meaning of the clause in question." I have referred at some length to the circumstances and condition of the people of Missouri, and the history of this Constitution, as a means of aiding in ascertaining the intention of the Convention in framing, and of the people in adopting, it; but with the full knowledge that at last it must be gathered mainly from the terms of the instrument itself.

When we come to interpret those terms, the first thing we are to seek is the thought which they express. To ascertain this, the first resort is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them—*Newell v. The People*, 3 Selden, 97. If thus regarded the words embody a definite meaning, the next point is to ascertain whether that meaning is consistent with the other parts of the instrument; for, in construing any part of it, the whole must be considered. The different parts reflect light on each other, and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency. It is the duty of courts, as far as practicable, to give some effect to every part, and so to reconcile the different provisions as to make the whole consistent and harmonious—*Sedg. on Stat. & Cons. Law*, 238.

Now, may it please the court, all I ask is, that the rules of construction, thus stated, shall be fairly applied in the interpretation of sec. 3 of art. 2, and I have no doubt of the result. With the most unhesitating confidence I say, that it is impossible for the court to find in that section the least indication of an intention to ordain a bill of attainder; but that, on the contrary, to attribute such an intention is a harsh and uncouth perversion of its *expressed* purpose to deal with the qualifications of voters, not to define crimes or prescribe punishments.

Moreover, to make it a bill of attainder, violates the principles of construction just stated, by adopting an interpretation which brings that section in direct conflict with other

parts of the Constitution ; when, to reject that interpretation, leaves the whole harmonious and consistent. Of course, if the section be a bill of attainder, it violates the Constitution of the United States. Now, such a violation cannot be justly imputed without developing a glaring inconsistency between that section and two clauses in the Declaration of Rights, with which otherwise it is in entire coincidence. They are the fifth and seventh clauses, in the following terms :

"5. That the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government, whenever it may be necessary to their safety and happiness ; but every such right should be exercised in pursuance of law, and consistently with the Constitution of the United States."

"7. That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States ; and that no law or ordinance of this State, in contravention or subversion thereof, can have any binding force."

May it please the court, is it within the range of any conceivable probability, that the framers of the Constitution, after adopting those clauses so unqualifiedly expressing the subjection of the people of this State in all things to the paramount authority of the national Constitution, could have intended to violate that Constitution in the very next article of their work ? Most manifestly not. When, therefore, it is attempted to give a construction to section 3 which imputes such an intention, it can only be done by producing an irreconcilable antagonism, where otherwise there would be harmony. Under such circumstances, I hold it to be the clear duty of the court to reject that interpretation which produces the contradiction, and to adopt that which causes none ; in other words, to repudiate the idea of any intention to ordain a bill of attainder, and consequently to reject the idea of there being any such thing there.

But it may be contended that there is, nevertheless, an attainder there, though not intended. Well, let us examine that point. I maintain that there is nothing in that section which has a single feature of an attainder. The court will please bear in mind, that the clause in the Constitution of the United States which forbids any State to pass a bill of attainder, has no meaning, except as to such a bill of attainder as was known to the authors of that Constitution at the time it was framed. It is not for us to enlarge or modify the

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meaning attached in that day to such a bill. Much less is it for us to say, that because the attainder known to our fathers, in 1787, inflicted certain disabilities on account of past acts, therefore a law now passed inflicting, on the same account, certain other disabilities, is also an attainder. And yet that is Mr. Glover's position. He shows that, at the common law, a judicial attainder is the stain or corruption of blood of a criminal capitally condemned; that such criminal is no longer of any credit or reputation; that he cannot be a witness in any court, nor is he capable of performing the functions of another man; and that he can neither inherit lands nor other hereditaments from his ancestors, nor retain those he was already in possession of, nor transmit them by descent to any heir. Now, I hold the learned counsel to his own description of an attainder, and say that in the section under discussion there is not one single feature of an attainder as he describes it. But, arguing by generalization, he claims that because an attainder in England consists of the "disabilities, disqualifications, and disfranchisements annexed to the conviction," therefore any provision of a Constitution which imposes, in reference to the right of suffrage, any disability, disqualification, or disfranchisement, on account of a past act, is an attainder. I totally deny this proposition, and hold the gentleman to his own definition, as derived from the works of English authors. It is to them we are to look for information on that point, for it was from England that the framers of the national Constitution received all the knowledge they had of an attainder; and it was to the attainder *they knew of* that they referred in framing that instrument. No court has the right now to enlarge the scope of the attainder known to them in 1787, and to establish, *arguendo*, an attainder different from that. Holding to that, I say that there is no attainder in the section in question; for it puts no stain upon any one; corrupts no one's blood; deprives no one of credit or reputation; does not render any one incompetent as a witness; does not prevent any one from inheriting and transmitting estate; does not work a forfeiture of any one's property. If it does none of these, it is, according to the gentleman's own definition, no bill of attainder.

But, may it please the court, I have a word more to say about the definition of an attainder given in Mr. Glover's argument. It is taken from Stephen's Commentaries, and is stated in these words: "This attainder is the stain or cor-

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ruption of the blood of a criminal capitally condemned. He is no longer of any credit or reputation. He cannot be a witness in any court, neither is he capable of performing the functions of another man." This would have been more complete, if the gentleman, in transferring it into his argument, had copied the whole of the last sentence as found in Stephen. I beg leave to supply the omission by adding to that sentence the words—"for, by an anticipation of his punishment, he is already dead in law." Now, if your honors please, a grave question arises here. If sec. 3 of art. 2 is a bill of attainder, somebody is "capitally condemned" by it. If General Blair be not so condemned by it, then, so far as he is concerned, it matters nothing to the court whether it is a bill of attainder or not. If it "capitally condemns" somebody else, that gives him no cause of action: it must bear upon him, or he has nothing to say about it. It is, therefore, an important question here, whether General Blair has really been "capitally condemned," and is, "by an anticipation of his punishment, already dead in law." If he has been, then are the public authorities greatly remiss in suffering him to be at large. And how can he maintain this action? One condemned to death is *civiliter mortuus*, and can maintain no action at all, and such an action as this dies with him. How, then, is this action now here? Is General Blair dead in law for one purpose and not for another? Can he come into court and say, "This Constitution has capitally condemned and attainted me, and I claim ten thousand dollars damages because I am, through it, dead in law"? May it please the court, I object to this thing of a man's being both dead and alive. I find no precedent for it in the books. It is another "new thing under the sun." I insist upon it that General Blair shall be either dead or alive; I deny his right to be both. If he is dead, I demand that that fact shall appear, not with "certainty to a common intent," nor to a "certain intent in general," but "to a certain intent in every particular"; and that he shall not avail himself of an *absque hoc*, and say that he has been condemned, attainted, and put to death in law by the Constitution, *without this*, that he has not been so condemned, attainted, and put to death, and is still alive and recalcitrant. If I thought I could get it, I would move the court for a rule upon him to elect which he will be, dead or alive; but as I hardly suppose that I could get such a rule, I shall have to make the election for him. I therefore protest that he has

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not been capitally condemned, is not attainted, is not dead in law; but is a live man to-day, in fact and in law, in spite of the bill of attainder alleged by his counsel to be contained in sec. 3 of art. 2 of the Constitution of Missouri.

But, if your honors please, Mr. Glover says that a bill of attainder includes also a bill of pains and penalties. I will not dispute that; nor will I question the correctness of his definition of the latter description of bill, as "a special act inflicting a milder punishment than death." But it is important to obtain, if practicable, a more distinct conception of such a bill, as it had been resorted to in England prior to the formation of the Constitution of the United States; for the framers of that Constitution could have had in view only such bills of pains and penalties as had then been known in British legislation. It is requisite, then, to inquire what kind of punishments had theretofore been imposed in England by such bills. I have not examined the books on this subject, for my case did not demand it. But I did not hesitate to assume *a priori*, that such a bill would operate either upon the person, the property, or the natural rights of the party against whom it might be passed; for it is upon them that punishments ordinarily bear. I, therefore, concluded that no instance could be found in a British bill of pains and penalties, of a man being deprived of mere political franchises, which are received and enjoyed by the subject only through the grant of the sovereign; and I find in Mr. Glover's argument the proof of this, and therefore need not look for it elsewhere. He sets out at large four different British statutes; two of which are respectively entitled "An act to inflict pains and penalties;" one is entitled "An act banishing and disabling the Earl of Clarendon"; and the fourth is "An act to incapacitate" certain named persons "from voting at election of members to serve in Parliament."

One of the bills of pains and penalties was aimed at Francis, Lord Bishop of Rochester, and 1. Deprived him of "all and singular his offices, dignities, promotions, and benefices ecclesiastical whatsoever;" 2. Forever disabled him from "taking, holding, or enjoying any office, dignity, promotion, benefice, or employment within this realm, or any other of his Majesty's dominions, and also from using or exercising any office, function, authority, or power, ecclesiastical or spiritual, whatsoever"; and, 3. Banished him the realm.

The other of the bills of pains and penalties was directed against John Plunket, and enacted that he "should be de-

tained and kept in close and safe custody, without bail or mainprize, during the pleasure of his Majesty, in any gaol or prison within the kingdom of Great Britain."

The act passed against the Earl of Clarendon banished him into perpetual exile, and forever disabled him "from having, holding, or enjoying any office or place of public trust, or any other employment whatsoever."

These three acts were selected by Mr. Glover, and they sustain my *a priori* position that British bills of pains and penalties acted only upon the person, the property, or the natural rights of the party. To be sure, in each of those cases the person would, by banishment or imprisonment, lose the opportunity of exercising the elective franchise if he had been a voter, but the deprivation of that privilege was not mentioned in either case.

The fourth of those statutes incapacitated the persons therein named from voting in any election of members of Parliament, because they belonged to "a weak and corrupt society in the borough of New Shoreham, the chief end of the institution of which was for the purpose of selling, from time to time, the seat or seats in Parliament for the said borough"; and the act says, "in order to prevent such unlawful practices for the future, and that the said borough from henceforth be duly represented in Parliament"—not in order to punish the persons therein named,—they are incapacitated as voters. The wide difference between this and the other acts will at once be perceived by the court. In them there are inflictions known in all countries as punishments, combined with deprivation of office and capacity to hold office; in this, there is simply a deprivation of a political privilege, which had been enjoyed by the parties through an act of Parliament, and now was taken away by such an act, for reasons of state therein expressed.

Now, may it please the court, concerning mere political privileges or franchises, I hold that, as they are received and enjoyed by individuals in no other way than through the mere grant of the sovereign power, that power may give them, withhold them, or take them away, at pleasure; and that he from who they are withheld or taken away, has no possible relief, but through that sovereign power itself. The elective franchise is but a mere political privilege, granted in England by the King in Parliament; in this country, by the people, the source of all political power. If the declaration in our Constitution, "that all political power is vested in and

derived from the people," be, as it claims to be, the fundamental axiom of this State, then no man can vote here, except as his right to do so is derived from them. The elective franchise is no natural right, in this or any other country. The very term franchise excludes the idea of natural right; for a franchise is a privilege granted by the sovereign authority to an individual. Nor is it a personal right until so granted, and then only so long as the grant is unrevoked by the power that made it. Here, that power is the people. They make and unmake Constitutions, and make and unmake voters. Every man that lives in this State, lives here subject to the absolutely irresponsible power of the people over the qualifications of voters; and by living here he consents to that subjection. If they see fit to-day, by a change of their Constitution, to allow women to vote, have they not the right to do it? If they decide, a year hence, in the same way, that women shall not vote, have they not the right to do it? May they not to-day allow negroes, unnaturalized foreigners, or boys of fifteen years old to vote, and to-morrow exclude them from the ballot-box? In short, have they not unlimited power over the whole subject of qualifications of voters? If not, who has? Such power must be lodged somewhere; and where else is it but with the people? And if they have it, who shall limit or restrain it? Shall the people's courts? Most assuredly, says Mr. Glover. But is not that setting the creature above the creator?

But Mr. Glover says: "If the fastening upon the citizen the disability to vote, for some act of his, be attainder, when inflicted in the ordinary course of judicial proceedings, the same disabilities must certainly be an attainder, when, for some act of his, they are inflicted by a bill."

Suppose, for the sake of the argument, we admit this to be a sound position, it has no application to the case in hand, for the following reasons: 1. The privation of the right to vote was never, in England, a result of an attainder, except as the loss of all civil and political rights followed the sentence of death; after which the convict was dead in law, as he is in this State, and kept in close custody, as he is here, until the day of his execution, and, of course, could not vote. 2. No British bill of pains and penalties, passed before the formation of our national Constitution, inflicted such privation. 3. British bills of pains and penalties always named the parties upon whom they were to bear. It follows, then, that sec. 3 of art. 2 has no resemblance to the British bill of

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pains and penalties known, in 1787, to the framers of the national Constitution ; because, 1. It is no "special act," but a general constitutional provision ; 2. It names nobody as the subject of disfranchisement ; and, 3. Disfranchisement was never a part of such a bill. Two essential elements of the British bill of pains and penalties, viz., its being a special act, and naming the party to be punished, are therefore wanting in that section ; and an element, viz., disfranchisement, is contained in it, which never was in such a bill. Dealing only in general terms, that section fixes disqualifications upon all who had done certain acts. That the people had the right to impose such disqualifications, seems to me as clear and simple a truth, as that a straight line is the shortest distance between two points. Let us see.

If the court please, no proposition of law is more evident, than that the sovereignty which may grant a privilege, may say on what terms it shall vest in, and be enjoyed by, the grantee. In every State Constitution in this country, you will find terms annexed to the exercise of the elective franchise. Every definition of the qualifications of voters, is but a statement of the terms upon which men may vote ; and in every instance such definitions refer to what the party has done, as well as to what he is. They say to the citizen, "If you have done certain things, you can vote." What is that, but looking to his past acts, to see if he has fulfilled the prescribed terms ? And your honors are familiar with the fact, that, by law, when judges of election are not acquainted with the qualifications of a person offering to vote, they may put him on his oath, and demand of him whether he has done certain things ; as, for instance, has resided a year in this State, or, if of foreign birth, has obtained naturalization. Now, if what he has done may be thus inquired into, and that under the application of a test oath, how is it that the State is precluded from shaping the terms another way, and saying to him, "If you have not done certain things, you can vote" ? If it has a right to impose its own terms, who shall limit or abridge that right ? What power may say to it, "You may put your terms one way, but not another ; you may look to a man's past acts in one form, but not in another ; you may apply a test oath as to what he has done, but not as to what he has not done" ? May it please the court, if there is in this tribunal, or any other on earth, a right thus to fetter the sovereignty of this State in this matter, then the State is no sovereignty. It must, in the very necessity of the case, be

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absolute in its authority over the terms on which its own grants of the elective franchise may be enjoyed, or it is the mere semblance of a sovereignty, wielding "a barren sceptre." The application to the case at bar is plain, and needs no enforcement. To my view, it enforces itself with resistless power.

But further, and to complete the *reductio ad absurdum*, our Constitution has always declared "that the people of this State have the exclusive right of regulating the internal government thereof;" and who does not know that an exclusive right debars all participation? An exclusive right of the people, participated in by some other power, is a monstrous solecism, peculiar to Mr. Glover's argument. To give his argument any force, he must in some way get rid of the people's exclusive right. He does not venture, in the face of the Constitution, to deny its existence, but claims for this court, created by the people, a higher power than theirs—a power to annul their action, and to set at naught the provisions of their Constitution. In other words, according to Mr. Glover, the people have that exclusive right, but, nevertheless, can hold it only until some court of justice, of their own creation, sees fit to assert its superior right to define the qualifications of voters in this State! May it please the court, if this be not the *ultima Thule* of absurdity, I know not where to look for it.

I come now to the second proposition taken by Mr. Glover in his argument—"That sec. 3 of art. 2 of the Constitution is an *ex post facto* law in the meaning of the Constitution of the United States, and being void for that reason, the other sections in aid must fall with it."

An *ex post facto* law is defined by him to be "one which punishes an act committed before it was made, in a manner it was not punished when committed; and this punishment may be capital, or it may consist in a mere forfeiture or disability."

Conceding the correctness of this definition, I shall endeavor briefly to show that sec. 3 does not come within the terms of that clause of the National Constitution which says that "no State shall pass an *ex post facto* law." For this purpose, I shall rely upon the following propositions:

1. The intention of the framers of the section is manifest on its face, not to impose a punishment, but to regulate the right of suffrage. The remarks previously made on the subject of looking to the intention of the framers of any law,

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apply with the same force here as in reference to attainder, and need not be repeated. If any other is at all admissible, the court cannot adopt a construction which forces this section into conflict with other parts of the Constitution.

2. This section does not use such words as are generally considered apt for expressing the intention to punish. For more than thirty years the statutes of this State have clearly indicated what are apt words for that purpose, both as to felonies and misdemeanors. I select from the Revised Statutes of 1835, two out of the many like instances to be found there, and likewise in the criminal code from that time to this.

As to felonies, I take sec. 23 of art. 3 of the "Act concerning crimes and their punishments," approved March 20, 1835, in these words:—"Every person who shall be convicted of burglary, shall be punished by imprisonment in the penitentiary, if in the first degree, not less than ten years; if in the second degree, not less than five, nor more than ten years; if in the third degree, not exceeding five years."

As to misdemeanors, I take sec. 37 of art. 8 of the same act, in these words: "If any person shall wilfully open or read, or cause to be read, any sealed letter not addressed to himself, without authority so to do from the writer thereof, or the person to whom it is addressed, he shall, on conviction, be adjudged guilty of a misdemeanor, and shall be punished by fine not exceeding \$250, or by imprisonment in a county jail not exceeding three months."

The court will observe the use in those sections of the phrase "shall be punished." It is used in similar provisions throughout the statute law of this State; not, I admit, in every instance where punishment is prescribed, but so nearly so, as to indicate that they are the words commonly employed to show the intention to punish. The same thing appears in sec. 14 of art. 2 of the Constitution, where it is provided that "whoever shall take said oath falsely, by swearing or by affirmation, shall, on conviction thereof, be adjudged guilty of perjury, and be punished by imprisonment in the penitentiary not less than two years."

Now, if your honors please, there is not only an absence from sec. 3 of apt words indicating a design to punish, but the whole terms of the section show that it was dealing with an entirely different subject. That which Mr. Glover relies on to sustain his position, viz., that this section "assumes,

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on the part of the State, power and jurisdiction to punish offences against the United States," when, as everybody knows, the State has no such power, is strong evidence that the section has no punitive character, and never was designed to have any. The court cannot impute such a design, without holding that the framers of the Constitution, while in one article professing entire submission to the Constitution and Government of the United States, deliberately engaged, in another article, in usurping the attributes and functions of that Government, in direct violation of the Constitution which established it. Again, I say that it is a violent breach of all known rules of construction, to bring the different parts of the Constitution into such conflict with each other and with the National Constitution, when another construction is fairly open which leaves those parts entirely harmonious with each other and with the fundamental law of the nation.

3. No law is punitive, under which no criminal proceeding can be instituted before the judicial tribunals of the State, according to the legally prescribed modes of criminal procedure. It needs only a superficial reading of this section to satisfy any legal mind, of even limited comprehension and acquirement, that no such proceeding is possible under it. Though, according to Mr. Glover, it enumerates and defines no less than "eighty-six crimes," it names no punishment for any one of them, nor does it authorize any indictment, trial or sentence. Can any law be held to impose a punishment, when under it no officer has a right to arrest a person, to cause him to be examined before a committing magistrate, to hold him to bail, or to commit him to prison; and when no grand jury can indict, or court try or sentence him? If it can, then this action has developed a third "new thing under the sun," and Solomon is "nowhere."

4. But it is contended by Mr. Glover that the punishment is inflicted when the party goes to the polls and offers to vote, and his vote is rejected. But, in the name of all the books on criminal law that ever were written, is that a punishment which can by no possibility overtake a man, except just when he pleases, in the exercise of his own unconstrained volition, to walk up to and invite it; and when he can do that only on one or two particular days in any year? From the time of my first experience of parental castigation to the present, I have supposed that punishment was inflicted against the culprit's will; but here is one that never

can be visited upon any man, except when he voluntarily seeks it.

5. Admitting, for the sake of the argument—but for that only—that the disqualification for voting imposed by the criminal law upon one convicted of crime, is a part of the punishment of the crime, I deny that it at all follows that such a disqualification, imposed by the people in forming their Constitution, is likewise a punishment, unless expressly so declared. I take the broad ground, that where the people, by a general constitutional provision, withhold or take away a political privilege, which they have a right to bestow on whom they please, and refuse to whom they please, there is no room for basing the idea of punishment upon any denial of such privilege, unless the people themselves declare the intention thereby to inflict punishment. Primarily, the withholding or taking away is merely the exercise of an absolute and unlimited discretion; and the intention to punish can only be known from the people themselves, by the words they use in their Constitution. No court has a right to strain out such an intent by inference; it must be declared and manifest. And the moment any tribunal or power, assuming to have discovered an intent to punish where it is not declared, interferes with the discretionary power of the people over this matter, that moment the people's authority is annihilated, and another power wields it.

If these positions be sound, there is no punitive character in the section in question; and the assumption that there is, is as indefensible, in a legal point of view, as many other charges against the Constitution and its framers are false in fact.

In conclusion, if the court please, I return to the great question in this case: Have the People of Missouri the right to prescribe in their Constitution the qualifications of voters? And yet I hold that this is really no question at all, as there is nothing, in fact, upon which to hang a question. That the people of a State, in framing their Constitution, have unlimited and absolute power over that whole subject, and the right to exercise that power when they please, how they please, in favor of whom they please, against whom they please, without accountability to, or subjection to the revision of, any tribunal or authority in the wide world, is one of those propositions which has never before, so far as I know, been disputed in this land, and concerning which I insist that there can be no question in this court. But if

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there is such a question, I agree with Mr. Glover that it is "the greatest ever yet submitted to an American court." This action is a deliberate, not to say audacious, attempt to strike, through the courts, a fatal blow at a State right, which all men in this land, of every section, every party, and every political creed, have always united in holding beyond the reach of interference, and which the Constitution of the United States recognizes, in the plainest terms, as belonging to the people of every State, to the utter exclusion of every other power and jurisdiction on earth.

Did I for a moment suppose that this or any other court would venture upon the experiment of annulling, by its judgment, the constitutional provisions by which the people of this State have sought to shield the ballot-box from the approach of rebels and traitors, I should tremble for the result. The man does not live who could forecast it. With the ambitious and unscrupulous politician, to whom the safety and happiness of the people are but a bauble compared with his own selfish aggrandizement, it may seem a small matter to trample this universally acknowledged right of a State in the dust; but when it is done—if that could be conceived possible—it will assume features and proportions so appalling, that even he would fly from his own work in confusion and terror. But I have no apprehension of such a result. Calmly reposing on the impregnable right of the people of a State, under any and all possible circumstances, to declare in their Constitution who shall and who shall not vote—to enfranchise and disfranchise whom they please, with or without cause by others deemed sufficient—I submit the case to the court, with too high a confidence in the soundness of its judgment, and too correct a sense of the proprieties of the occasion, to permit of an intimation of "anarchy and bloodshed," as the result of a decision adverse to that great right.

WAGNER, Judge, delivered the opinion of the court.

This case comes before us on a writ of error from the Circuit Court of St. Louis county. The plaintiff brought his action against the defendants, who were judges of an election held in the city of St. Louis on the 7th day of November, 1865, for rejecting his vote, and claimed damages in the sum of ten thousand dollars. In his petition he avers his

qualifications as a voter, and states that he offered to take a certain oath which is therein set out, but which is not the oath required to be taken by voters by the Constitution of this State, and there was no authority for receiving any such oath by the judges of election. It may therefore be considered, for the purposes of this case, as a refusal to take the constitutional oath. The defendants demurred to the petition of the plaintiff because it did not state facts sufficient to constitute a cause of action in this, that it did not state that the plaintiff, when he offered to vote, took, or offered to take, the oath of loyalty required by the Constitution of the State of Missouri to be taken by all voters as a condition precedent to their exercise of the right of suffrage at any election held in this State. This demurrer was sustained by the court below.

The question raised for consideration is of the gravest importance, and involves a consideration of the constitutionality of the oath of loyalty, so far as the same is applicable to voters. It is contended that the third section of the second article of the Constitution of this State, which prescribes the oath, is a nullity, because it is a bill of attainder in the meaning of the Constitution of the United States, and because it is an *ex post facto* law in the meaning of the Constitution of the United States. *Ex post facto* laws and bills of attainder have been so much discussed of late, in connection with acts springing out of the troubles through which the country has just passed, that it is unnecessary to enter upon an argument concerning their nature and character. The real point to be determined is, whether the constitutional oath which is prescribed as a condition precedent to every man's right to vote falls within the inhibitions of the Constitution of the United States forbidding the States to pass such laws.

The tenth section of the first article of the Constitution of the United States declares that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of a contract." The tenth amendment to the Constitution of

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the United States provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The States, when they entered the Union, retained all their original power and sovereignty, except such as were expressly surrendered to the General Government, or they were expressly prohibited from exercising. Subject to these exceptions, they are independent commonwealths, and the exclusive judges of what is just and proper for their own safety, welfare, and happiness. From the foundation of the government, the Supreme Court of the United States as well as the courts of the respective States have always abstained from declaring a law unconstitutional unless it was a case free from all doubt. The co-ordinate departments are all equal, each acts under the same solemn sanctions, and one will not assume the responsibility of annulling the work of the other except upon the clearest evidence that it has transcended its powers, or violated the organic law of the land. To justify a court in pronouncing a legislative act unconstitutional, or a provision of a State Constitution to be in contravention of the Constitution of the United States, "the case must be so clear," to use the language of a learned author, "that no reasonable doubt can be said to exist"—Sedg. on Stat. & Const. Law, 592. The judiciary will not be justified, nor indeed will it be authorized, to nullify and abrogate a law merely because it deems the law unwise, unjust, or impolitic—those being questions purely within the cognizance of the law maker, the remedy not being through the agency of the courts, but in the hands of the people by the exercise of their political power. Any other practice would tend to produce continual conflict and dissension between the different branches, where mutual respect and harmony should prevail, and ultimately paralyze the functions of government. But, notwithstanding these considerations, where any law, or any provision or clause of a State Constitution, clearly and unquestionably violates the Constitution of the United States, the courts can no more shrink from declaring it void and of

no effect, than they can refuse to pass upon and determine any ordinary matter which comes within the admitted circle of their jurisdiction.

When the Federal Constitution was adopted, we derived our whole system of common law from the parent country, and the prohibition against *ex post facto* laws and bills of attainder was levelled against such laws as known and practised in England. In those cases in English history where bills of attainder have been passed, they have generally referred to the parties by name; for they are in the nature of judicial sentences, and directly affect those against whom they are aimed, without the formality of a trial. We have seen no case (and it would seem to be an impossibility) where such laws have been passed, having universal application, and were laid down as rules comprehending the whole people of a State. In the act for banishing and disabling the Earl of Clarendon, the law designated him by name, and proceeded to inflict upon him certain penalties without trial. So, too, in the cases of the Bishop of Rochester and John Plunket, and in the act disfranchising John Burnett and his associates from voting at election of members to serve in Parliament, and for the preventing bribery and corruption in the election of members to serve for the borough of New Shoreham. The Earl of Kildare and his adherents were attainted without specifying their names, but sentence was absolutely passed upon them, and execution followed whenever they were identified, without reference to any act on their part. But the section of the Constitution we are now considering has been before the Supreme Court of the United States in the Cummings case, and it was there held by a majority of the judges, reversing the decision of this court, that the provision was in the nature of pains and penalties so far as it related to the oath required to be taken by preachers, and was as to them consequently void. Five of the judges concurred in this opinion, and four dissented; and Mr. Justice Miller, on behalf of the minority of the court, delivered an opinion which for ability, logic, and admirable juridical criticism,

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has rarely been excelled even in that august tribunal. It is now claimed that that decision is decisive, and also concludes this case. Did we think so, we should unhesitatingly follow it, although our opinions and convictions remain unchanged; for it is to the interest of the country that an end should be put to litigation and principles of law settled, and whenever the courts of last resort fairly decide a question coming within their jurisdiction, it is the duty of inferior courts to submit and to obey the paramount authority, though they may not be satisfied with the result. There was but one question presented to the court for adjudication in the Cummings case, and that was the constitutionality of the oath of loyalty so far as the same applied to preachers and ministers of the Gospel. It is true, Judge Field, who delivered the opinion of the majority of the court, *arguendo*, speaks of other pursuits, professions and trusts, for the following or holding of which the oath is exacted as a condition precedent, and condemns them all as liable to the same objection.

Now, in a case where the principle is identical with the one in the decision, we feel bound to follow it; but arguments or illustrations on different points, not necessary to the decision of the case, constitute no part of the judgment of the court, and can no more be deemed binding authority than the animadversion which the learned justice sees fit to pass upon the whole constitutional provision. It is not for us to determine whether the law is just or unjust, politic or impolitic—that is the appropriate function of another body. Nor is it within the sphere of our duties to go into an inquiry, or speculate as to the effect it may have on future political parties. Mr. Justice Iredell, who possessed an unclouded intellect and unbiassed judgment, after stating in *Calder v. Bull*, that a statute in violation of the Constitution is void, continues: “If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural

justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed on the subject; and all that the court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." There is no fixed and certain standard of reference by which the expediency or justice of a measure can be ascertained, and in order to form a correct judgment it is necessary to have a knowledge and acquaintance with all the facts and circumstances which originated it or led to its adoption.

The decision of the Supreme Court of the United States in the Cummings case proceeds on the idea, that the right to pursue a calling or profession is a natural and inalienable right, and that a law precluding a person from practising his calling or profession on account of past conduct is inflicting a penalty, and therefore void. There are certain rights which inhere in and attach to the person, and of which he cannot be deprived except by forfeiture for crimes, whereof he must be first tried and convicted according to due process of law. These are termed natural or absolute rights. Blackstone says: "By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; which would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it." These rights may be arranged under the following heads: 1. The right of personal security; 2. The right of personal liberty; and 3. The right to acquire and enjoy property. To these the distinguished commentator on American law has added a fourth head, which found no place under the English system, viz.: The free exercise and enjoyment of religious profession and worship.

When the sturdy barons wrested from a despotic king *magna charta*, they put into that great instrument, "No free-man shall be taken (arrested) or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed

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or exiled, or any otherwise destroyed ; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or the law of the land. We will sell to no man, we will deny to no man, we will delay to no man, either justice or right." The words "by the law of the land," as used in the great charter, are understood to mean due process of law—that is, by indictment or presentment of good and lawful men. And Story remarks that the better and larger definition of "due process" is, that it means law, in its regular course of administration, through courts of justice. Lord Coke, in commenting upon the above passage in *magna charta*, says that it enunciated no new principle, but was declaratory of the common law. The illustrious author of the Declaration of Independence embodies the same inestimable axioms, when he declares that "all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness." Essentially the same principles are inserted in the amendments to the Constitution of the United States, and in the bills of rights of the respective States. The right, then, to life, liberty, and private property, is natural, absolute, and vested, and belongs as well to the individual in a state unconnected with society, as in the most carefully guarded and well arranged system of government. He cannot be deprived of life but by due process of law ; he can be restrained of his liberty only by the same means ; and his right to acquire and enjoy property, reap the fruits and earnings of his own industry, should be fully guaranteed and protected. A man may be said to have a special property in his profession or calling, by which means he makes his support, and that he can be deprived of it only in the usual manner, according to the common forms of law. In a state of nature, if he had never entered into society he would undoubtedly have the right to select his avocation, whereon to depend for maintenance, and he cannot be said to have surrendered it by coming into the social compact, only so far as may be necessary for the general good, in manner to be regulated by law.

But, is the right to vote, or to exercise the privilege of the

elective franchise, a right either natural, absolute, or vested? It is certain that in a state of nature disconnected with government, no person has or can enjoy it; whilst his right of breathing, free locomotion, and the acquisition and enjoyment of property, is perfect and complete. And here it is worthy of observation, that Judge Field, in the Cummings case, while enumerating several of the classes to which the oath extends, all of which he considers renders it obnoxious to the constitutional inhibition, carefully and guardedly refrains from including the right to vote in the category.

That the privilege of participating in the elective franchise in this free and enlightened country is an important and interesting one, is most true; but we are not aware that it has ever been held or adjudged to be a vested interest in any individual. Judge Washington, in *Corfield v. Coryell*, 4 Wash. C. C. 371, speaks of it as one of the fundamental franchises under our form of government, to be regulated and established by the laws or constitution of the State in which it is to be exercised. The leading case on the subject is *Ashby v. White*, 2 Ld. Raym. 938 (S. C.); 1 Sm. L. C. 342, where the plaintiff averred that he was a "burgess" and an inhabitant of the borough of Aylesbury when the election was held; that being such burgess and inhabitant he had the right to vote; and that the defendants, who were constables of said borough, and officiating as judges of the election, were then and there requested to receive and allow his vote, but that they absolutely refused to receive and allow the same, whereupon he brought his suit and claimed damages in the sum of £200. Upon a plea of not guilty, there was a verdict for the plaintiff, which was afterwards arrested in the King's Bench.

Powell, Powys and Gould, justices, held that the action could not be maintained; but Holt, C. J., dissented, and gave an opinion for the plaintiff. An appeal was prosecuted to the House of Lords, where the judgment of the King's Bench was reversed, and the views of Holt adopted and sustained. But the Chief Justice did not proceed upon the

idea of a natural and inherent right in the citizen to vote, for he expressly says that before the statute of 8 Hen. VI., ch. 7, any man that had a freehold, though never so small, had a right of voting; but by that statute the right of election was confined to such persons as had lands or tenements to the yearly value of forty shillings, because, as the statute said of the tumults and disorders which happened at elections by the excessive and outrageous number of electors. But he states that the right of election in that case was a direct grant, incident to and inseparable from the freehold. It was the case of a burgess, and the plaintiff claimed the right to vote by reason of his burgesship, and Littleton in his chapter of tenure in burgage, 162, c. l. 180 b. 109, was quoted, where he says: "Tenure in burgage is, where an ancient borough is, of which the King is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage." And also, sec. 164, where he says: "And it is, to-wit, that the ancient towns called boroughs be the most ancient towns that be within England, and are called boroughs because of them come the burgesses to Parliament." So that the tenure of burgage was from the antiquity, and their tenure in socage was the reason of their estate, and the right of election was annexed to their estate. There is no such annexation or grant of franchise as to elections in this country.

It will now be necessary to inquire by what charter or authority, and upon what terms, the citizen is invested with the ballot in this State. As before remarked, outside of society and disconnected with government, no person either has or can exercise the elective franchise as a natural right, and he only receives it upon entering the social compact, subject to such qualifications as may be prescribed. Prior to the adoption of the Federal Constitution, the respective States possessed unlimited and unrestricted sovereignty, and retained the same ever afterwards, except so far as they granted certain powers to the General Government, or prohibited themselves from doing certain acts. Every State

reserved to itself the exclusive right of regulating its own internal government and police. Previous to the year 1820, Missouri was a mere Territory, not a State clothed with the power of self-government; but in pursuance of the authority of the act of Congress of March 6, passed in that year, the inhabitants of the Territory of Missouri elected delegates to a Convention to form a Constitution for the State. The only limitation imposed by Congress was, that the Constitution, when formed, should "be republican, and not inconsistent with the Constitution of the United States." Subject to these conditions, there was no limitation or restraint upon their action as to the organism and principles of the State they were about to form. The people, through their representatives assembled in Convention, proceeded to form the Constitution which was to organize them into a State, and in the "Declaration of Rights," embodied in that Constitution as general, great and essential principles of liberty and free government, we find the following: 1. "That all political power is vested in, and derived from, the people." 2. "That the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness." With these provisions in her Constitution, Missouri was admitted in the Union, and recognized as one of the sisters in the republic, on the same terms, and with the same powers, as the original States. Her admission was a direct and positive declaration that her Constitution was republican in form, and not inconsistent with the Constitution of the United States. There was, then, a complete reservation by the people to exclusively regulate and control the internal government and police of the State, and to alter, amend, or abolish their Constitution whenever they might deem it necessary for their safety and happiness. Now, what is meant by the "people," as used in this connection? Ordinarily, it may be true, that when we speak of the people, the entire body of

the inhabitants of the State is comprehended. But this cannot be so in a political sense. It can only mean that portion of the inhabitants who are entrusted with political power. Neither in this, nor in any of the American States, did the inhabitants, other than qualified voters, ever exercise political power, and it is only through the instrumentality of ballots that such power is or can be exercised. This truth is exhibited by the fact that, whilst the Constitution declared that all power resided in the people, less than one-fourth of all the inhabitants exclusively exercised the political power, and more than three-fourths were always disfranchised.

The people, for political purposes, must be considered synonymous with qualified voters, and their very first act in the formation of a State Government was to exclude from the right of suffrage more than three-fourths of the whole inhabitants. The exclusion of women, children and negroes is purely arbitrary, and fixed and regulated by law. If the power to regulate the internal government and police of the State resided in the people, and was their "inherent, sole, and exclusive right," the conclusion is inevitable that it was their peculiar and exclusive province to say and determine what should constitute any inhabitant of the State a qualified voter. The power must reside somewhere, and it can only be with the people, and they have always exercised it, both negatively and affirmatively.

It is not perceived that there is any restraint over the power on this subject. Certainly not in the Constitution of the United States, for there is not to be found in that instrument a single sentence, paragraph, or word, which gives the National Government power over the qualifications of voters in any of the States. But the direct opposite is affirmed in that clause cited in the former part of this opinion, which declares "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

When the people, in 1865, formed and adopted a new Constitution as their organic law, they exercised an unques-

tioned power—an undisputed right. They altered and abolished their Constitution, and formed a new one, in which, in pursuance of their exclusive right in regulating their internal government, they prescribed certain qualifications and conditions for the exercise of the elective franchise.

Of their perfect and exclusive right to do this, we do not entertain the slightest doubt. The right to vote is not vested—it is purely conventional, and may be enlarged or restricted, granted or withheld, at pleasure, and with or without fault. If a person loans another certain property gratuitously, and the possession is resumed on account of abuse or ill treatment, is the taking it from the borrower a penalty or punishment within the meaning of the Constitution of the United States?

But it is said that the oath of loyalty cannot be regarded as a qualification, because it is not attainable by all. Judge Field expresses this idea in the Cummings case, but it is sufficient answer to say that the remark was not made on a question like the one now under consideration. The illustrations put by Judge Miller in the same case are exceedingly apposite, and seem to be incontrovertible. He says: "The Constitution of the United States provides as a qualification for the office of President and Vice President, that the person elected must be a native born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The Constitutions of nearly all the States require, as a qualification for voting, that the voter should be a white male citizen. Is this a punishment for all the blacks who can never become white? It was a qualification required by some of the State Constitutions for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any State this is a qualification they can never attain, for every year removes them further away from the designated age. Is it a punishment? The distinguished commentator on American law, and Chancellor of the State of New York, was deprived of that office by this provision of the Constitu-

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tion of that State. He was, just in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again by a law passed after he had accepted the office."

It is well known that in the early history of this Government, several of the States admitted free negroes to vote on an equality with whites, and subsequently they divested them of that right, denied them that privilege, and confined the elective franchise solely to whites. They were disfranchised because they were black, and a white qualification was imposed, which it was physically impossible for them to attain. The privilege was withdrawn from them; they were disfranchised because they were black. We apprehend that it will not be contended that depriving them of the right of suffrage was a punishment, or in the nature of pains and penalties. The law-makers, we presume, owing to peculiar circumstances, thought they were not discreet persons to be entrusted with the ballot, just as the framers of our Constitution, we suppose, considered that those who had betrayed our flag, and exhibited their hostility to the Government, were, for the time being, unsafe and unfit repositories of political power.

The principle of the provision in the Constitution is involved in the power, and flows from the duty of the State to protect itself, that is, the welfare of the people. It proceeds upon the distinction between laws passed to punish for offences, in order to prevent their repetition, and laws passed to protect the public franchises and privileges from abuse by falling into unworthy and improper hands. The State may not pass laws in the form or with the effect of bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts; it may and has full power to pass laws, restrictive and exclusive, for the preservation or promotion of the common interests, as political and social emergencies may from time to time require, though in certain cases disabilities may directly flow as a consequence. It should never be forgotten that the State is organized for the

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public weal, as well as individual purposes; and while it may not disregard and violate the safeguards that are thrown around the citizen for his protection by the Constitution, it cannot neglect to perform and do what is demanded for the public good.

It has grown into an axiom of the law, that public grants are to be construed strictly; and in the absence of any power expressly conceded to the United States, or where its exercise is not directly denied by the Federal Constitution, the State is not to be presumed, in any grant, to part with any of the power inherent in it for the protection and promotion of the common welfare. The power in the State to preserve the general good, and promote the public welfare, is inherent and supreme; and deny and destroy this cardinal maxim, and the very foundation of our system is sapped, and the State is shorn of all power for self-protection.

Believing that the provision in the State Constitution prescribing an oath for voters is not in opposition to the Constitution of the United States, we affirm the judgment. Judge Fagg concurs.

HOLMES, Judge. The ground of the demurrer was that the petition did not state facts sufficient to constitute a cause of action—R. C. 1855, p. 1231, §§ 6, 7, 10.

The petition stated that on the 7th day of November, 1865, "and long prior thereto," the plaintiff was "a native born free white male citizen of the United States, and of the State of Missouri, residing in the city and county of St. Louis, and over the age of twenty-one years." The statements of the petitioner concerning his services in the armies of the United States (which were, doubtless, highly meritorious,) I regard as surplusage in the pleading. It is further stated that there was an election held on that day for a county auditor and a judge of the County Court in the Sixth judicial district, and that the defendants were the legally appointed judges of election "for the eastern election precinct of the sixth ward of the city of St. Louis, within the said county of St. Louis,

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in which ward the plaintiff had resided continuously for several years, and was then residing." It is then stated that the plaintiff offered his ballot together with "an affidavit, being an oath of allegiance," (which he set forth in the petition,) and requested the judges to receive his vote, and that the same was wilfully rejected.

There is no distinct averment in the petition that the plaintiff had resided in this State one year next preceding the election, nor that during the last sixty days of that period he had resided in the county, city, or election district, where he offered to vote. It is averred that on that day, and long prior thereto, he was a citizen of the State, residing in the city and county of St. Louis, but it is not said how long prior thereto. It is also averred that the defendants were judges of the election for the eastern election precinct of the sixth ward of the city, in which ward he had resided continuously for several years, and was then residing; but it is not stated that any one of those several years was the year next preceding the election, nor that during the last sixty days of that year he had resided in the county, city or district in which he had offered to vote. All that is averred here may be true, and yet it may be also true that the continuous residence for several years (of which the petitioner speaks) may have been at some indefinite period prior to the commencement of his military services, and that his then present residence in the ward may have commenced within the sixty days next preceding the election.

A qualified voter does not lose his residence by reason of his being absent from his place of residence, while serving in the volunteer army of the United States—Const. of Mo., Art. II., § 21.

But there is still no averment that the plaintiff had been a resident of this State, or had a place of residence in this State, for one year next preceding the election, or within the county, city, or district, for the last sixty days of that year. For all that is stated in the petition he may have become a non-resident, though he may have been at some pri-

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or time a resident, and he may actually have been a non-resident within the time specified. In the case of *Pryce v. Belcher*, 3 Com. B. 58, the plaintiff was a registered voter of the borough of Abingdon, but it was said that if in consequence of his having become a non-resident he had lost his right to vote there under the existing laws, he could not maintain an action against the judges of election for refusing to receive his vote—1 Smith's Lead. Cas. 309 (131); 3 Man. G. & S. 77 (S. C.)

The cause of action is founded upon the legal right to vote. The action is maintainable where that right has been wilfully, maliciously or wrongfully denied by the judges of election, and for the reason that where there is a right there is a remedy. When the British Parliament by the statute of 8 Hen. VI., ch. 7, disfranchised all freeholders under forty shillings yearly value, because their voting had led to tumults and disorders at elections (there being no higher constitutional authority to forbid it), the legal right was gone, and they could no longer maintain an action for a refusal to receive their votes—*Ashby v. White*, 2 Ld. Raym. 938. All the facts that are necessary to constitute the right under the law, and show that it exists as a legal right, must be stated in the petition. The plaintiff cannot be allowed to judge of the facts both for himself and for the court, nor to state his own conclusions of law as the foundation of his rights; and unless the facts stated in the petition are sufficient to show that the plaintiff was by law entitled to vote, and had a subsisting legal right to vote, the rejection of his ballot by the judges of election cannot amount to anything which the court can consider to be an infringement of his right. If there be no right there is no injury, or it is merely *damnum absque injuria*—*Curry v. Cabliss*, 37 Mo. 330; *Blanchard v. Stearns*, 5 Metc. 298; *Ashby v. White*, 2 Ld. Raym. 938; 1 Smith Lea. Cas. 290-308. It has been held that a man may be disfranchised for an indictable offence without his being convicted of it—4 Com. Dig. (tit. *Franchises*, F. 20) p. 270.

The statute provides that "when any person offers to vote

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with whose qualifications neither of the judges is personally acquainted, either of the judges may administer an oath and examine him touching his qualifications as a voter"—R. C. 1855, p. 703, § 41. It is not stated in this petition that either of the judges was personally acquainted with the plaintiff's qualifications as a voter, nor that he offered to be examined under oath touching his qualifications. It is averred in effect that he presented an affidavit, called an oath of allegiance, and demanded that his vote should be received.

It is averred also, that the defendants, "well knowing that the plaintiff was a lawful voter at said election, and entitled to deposit his ballot," refused to receive his vote. This is a conclusion of law, which the facts stated do not warrant—Curry v. Cabliss, 37 Mo. 330.

Where a plaintiff is asking judgment for ten thousand dollars damages against the judges of election for wilfully and wrongfully rejecting his vote, the court may properly consider, with some technical precision, whether the facts which alone can constitute a lawful ground for such demand, have been stated with sufficient fullness and certainty in his petition to authorize the rendering of such judgment.

Now, the eighteenth section of the second article of the Constitution of this State, defining the qualifications of voters, required that the plaintiff should not only be a white male citizen of the United States over the age of twenty-one years, but that he should have "resided in this State one year next preceding the election," and that, "during the last sixty days of that period" he should have "resided in the county, city or town" where he offered to vote, as well as that he should not vote "elsewhere than in the election district of which he was at the time a resident," before he could have a legal right to vote in this State, or at this election—Const. of Mo., Art. II., § 18. These were necessary qualifications of all voters, without which neither he nor any other person could be legally entitled to vote. In my opinion, the facts stated in the petition, if true, do not show that the plaintiff had a right to vote at this election; and for this reason I

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think the demurrer was rightfully sustained, and concur in affirming the judgment.

If this disqualification referred to in this eighteenth section were held to be void as being a bill of pains and penalties within the prohibition of the Federal Constitution, the qualifications therein required would (as I conceive) still remain unaffected by the decision. The question whether or not the plaintiff's vote could lawfully have been refused merely because the oath of allegiance, which he offered to take, omitted the first clause of the prescribed *oath of loyalty*, is one which I have deemed it unnecessary for me to consider at large herein, and I give no opinion on that point. The decision of the court places the case in a condition that will enable the plaintiff, if he chooses, to bring the subject before the higher tribunal, to which it more peculiarly belongs to put a final construction upon the Constitution of the United States, and to decide upon questions of conflict between that instrument and the Constitution of a State.



HENRY DREHMAN, Appellant, v. CHARLES G. STIFEL, Respondent.

1. *Constitution—Ordinance—Indemnity and Oblivion—Military Power.*—The ordinance of the Convention of March 17, 1865, incorporated in the Constitution, Art. XI., § 34, which forbids the prosecution of all civil actions or criminal proceedings against any one for acts done after January 1, 1861, in pursuance of military orders or in virtue of military authority, does not conflict with the provisions of the Constitution of the United States. Although retrospective in its operations, it is not a bill of attainder, does not violate the obligations of a contract, and does not divest any settled right of property.
2. *Constitution—Action—Forcible Entry and Detainer—Vested Rights.*—A right to recover damages in an action of forcible entry and detainer is not a vested right in property, and is not protected by the Constitution of the United States against the action of a State in its sovereign capacity when acting in Convention, or in virtue of its sovereign powers.
3. *Constitution—State—Sovereignty.*—The people of a State in their sovereign capacity, when founding a civil government, have power to determine

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how much of his rights and liberties the citizen shall surrender for the public good, and there is no limitation to this power of the State except the prohibitions of the Constitution of the United States.

4. *Constitution—Retrospective Laws—State.*—The Constitution of the United States does not prohibit a State from enacting retrospective laws or ordinances of a civil nature which take away a right of action, or divest rights invested in an individual, if these laws do not impair the obligation of a contract nor divest settled rights of property. The ordinance of the Convention of March 17, 1865, incorporated in Art. XI, § 31, of the Constitution, is an act of indemnity and oblivion and pardon; of indemnity as far as it affects civil actions, and oblivion as it affects criminal proceedings; and is not inconsistent with the Bill of Rights.
5. *Constitution—Property taken for Public Uses—Military Authority.*—For property taken for public use, or for property destroyed by military authority, the Government and not the officer is responsible.
6. *Constitution—Ordinance—Evidence.*—The provisions of the ordinance of March 17, 1865, and Art. XI, § 31, of the Constitution, have the effect of declaring as a presumption of law and a rule of evidence, that, when the military authority or military orders are shown that the emergency or necessity which justified the acts done shall be presumed as a matter of law. It changes the rules of evidence, and makes that a justification and a defence which would not have been such before without further proof. The military necessity only is thus conclusively proved; but the question whether the military authority or orders existed in fact, or whether the acts complained of were done by military authority or under military orders, or were the acts of the individual himself in his private capacity, or were an abuse of power, or a perversion of orders for private ends or malicious purposes, still remain open for the determination of a jury.
7. *Forcible Entry—Forcible Detainer—Practice.*—If the original forcible entry and detainer be justifiable, a suit for subsequent unlawful detainer cannot be maintained without a previous demand in writing for the possession of the premises and a refusal to deliver possession.

*Appeal from St. Louis Circuit Court.*

The plaintiff offered testimony tending to prove the forcible entry and detainer by defendant.

The defendant, to prove that he acted by military orders and authority, called C. W. Bissell, who testified that he was assistant adjutant-general to Gen. Lyon, first; that he was then assigned to duty with Gen. Sweeny; the defendant was colonel of the 5th regiment reserved corps Missouri volunteers; he was appointed adjutant soon after the street fight. "I was ordered by Gen. Nathaniel Lyon to examine these

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head-quarters with others, with a view of putting them in a state of military defence against attack, which was supposed might be made, and report their condition. I made a report in writing and General Lyon approved it. I then received a positive verbal order from Gen. Lyon; but he told me not to have it then executed, but to request Gen. Sweeny to go with me and examine the premises at both head-quarters. Gen. Sweeny and myself went to the brewery of defendant, and, after a thorough examination, Gen. Sweeny gave a positive order to the defendant, Col. Stifel, to have all those old ruins pulled down and removed, the grounds smoothed, and to put all the ground at and adjoining the brewery under the same fence for parade ground and other military uses. This was after the 8th of May, 1861, and probably as late as June, 1861. Gen. Lyon was then an officer in the United States army, and was in command of the Department of Missouri. Gen. Sweeny was also an officer in the United States army, and was in command of all the forces in St. Louis. I do not know that either Gen. Lyon or Gen. Sweeny had been promoted to the rank of general, but their commands were as I have stated."

Cross-examined.—"I do not know the day Gen. Harney was relieved of the command of this department and Gen. Lyon was assigned to it; I think it was about the 4th of May, 1861. I never saw Gen. Lyon's commission, or Gen. Sweeny's, as generals; but I saw Gen. Sweeny mustered in, and saw his muster-roll as a general, and I was recognized and paid as a colonel on his staff as early as July, 1861, and he was recognized and paid as a general at the same time by a United States paymaster. I know the Government leased the south wing of the brewery of defendant, and the Government had an addition built to it in 1861 for military purposes; the removal of Drehman's house was suggested first by Col. Stifel, and it was at his suggestion that it was acted upon. I consulted fully with him as I did with other regimental commanders as to what was necessary to be done with reference to putting all the posts in a state of military defence.

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## Plaintiff's instructions :

1. The jury have nothing to do with the title of either party to the ownership of the land. It is a question of possession only in the plaintiff, and of forcibly entry and detainer by the defendant; therefore, if the jury find that the plaintiff was in peaceable possession of the premises in dispute, and that defendant, acting by his agents or servants, entered upon the same against the will of the plaintiff, and took possession thereof and detained the possession, the verdict must be for the plaintiff.

The above instruction was given by the court with this addition: "Unless the defendant has established his defence according to the instructions given at his request."

2. In order to constitute such a possession in the plaintiff as will sustain this action, it is not necessary that the plaintiff should stand on the land, or keep an agent or servant there; but any act done by himself on the premises indicating his intention to hold the possession thereof to himself, will be sufficient to give him the actual possession, and the right to maintain this action.

3. If the jury find for the plaintiff, they will assess damages for waste and injury committed upon the premises, as well as for all rents and profits of said premises up to the present time; and they will also find what is the value of the monthly rents and profits of said premises.

4. If the defendant was a military officer of the State or the United States, he might lawfully take possession of the property of plaintiff to prevent it from falling into the hands of the public enemy; but, in order to justify the seizure for that purpose, the danger must be immediate and impending, and not remote or contingent. He might also have taken them for public use and impressed them into the public service, but in order to justify such taking there must have been an immediate and pressing danger or urgent necessity existing at the time, but not otherwise; and, unless the defendant has shown the necessity or emergency existing at the time of the alleged order and destruction of plaintiff's prop-

erty, it is no defence or justification, and the jury must find for the plaintiff.

5. The 2d section of the ordinance plead in bar of this action is a law retrospective in its action, and in violation of the Constitution of the State of Missouri existing at the time of the passage of said ordinance, and of no validity.

6. Although the jury may believe from the evidence that defendant took possession of the premises of the plaintiff, and destroyed the improvements thereon, in pursuance of an order from one Lyon, or Sweeny, or the witness Bissell, under whom the defendant was acting in a subordinate capacity; yet, unless he shall have shown an authority from the Government of the State, or the United States, vested in said Lyon, or Sweeny, or Bissell, or defendant, at the time the act was done, to do the act, then the ordinance is no protection to the defendant, and the jury must find for the plaintiff.

7. The jury are instructed that the testimony of the witness Bissell, in relation to the orders of Lyon, or Sweeny, to defendant, are excluded from their consideration, and are not evidence in the cause.

8. The 2d section of the ordinance plead in bar of this action is a bill of attainder within the meaning of the Constitution of the United States, and of no validity.

The court gave Nos. 1, 2 and 3, but refused to give Nos. 4, 5, 6, 7 and 8.

The defendant asked the following instructions :

1. If the jury believe and find from the evidence in the cause, that the act of forcible entry and detainer complained of in this action against the defendant was an act by him done, performed and executed after the 1st day of January, 1861, by virtue of military authority vested in him by the Government of the United States to do such acts, or was by him so done, performed and executed in pursuance of an order received by him from a person vested with such authority, then the plaintiff is not entitled to recover in this suit, and your verdict should be for the defendant.

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2. The jury are instructed that if Gen. Sweeny, with the approval of Gen. Lyon, issued a military order for tearing away and removing the premises in question, directed to the defendant (if the defendant was at said time in the military service of the United States Government, and subject thereby to the authority of the said generals), then the matter of how said order was procured, or at whose instance, or under what circumstances, cannot be considered by them; for the order, when issued by competent authority, is a justification of the doing of the act by a military subordinate.

3. If the jury believe and find from the evidence that Gen. Lyon was on the 15th June, 1861, in the military command of the city of St. Louis and State of Missouri, and that General Sweeny was in command at the same time of the United States reserve corps, and of which corps the 5th regiment was under the command of Col. Stifel, the defendant; and that on or about that time an order was issued by Gen. Sweeny, with the approval of Gen. Lyon, directed to the defendant, commanding him to tear away and remove the building and building materials upon the premises in question, and enter upon and hold the same for military purposes, and that the defendant, in execution of such order and in obedience to the same, did tear away and remove the said building and building materials, and enter upon the said premises and hold the same, and that the said entry and holding under such circumstances constitute the forcible entry and detainer complained of in this action, then the plaintiff cannot recover herein, and in such case it makes no difference (and the jury are not permitted to inquire into) whether such act was an act of military necessity or otherwise.

4. The jury are instructed that if the entry upon the premises in question was made by the defendant as a military act, done under military authority, and in the doing of which he was and is to be protected under the provisions of the ordinance of the people of the State providing for the vacating of certain civil offices in the State, filling the same anew, and

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protecting the citizens from injury and harassment, pleaded in the cause, then the subsequent detainer of said premises at any time afterwards by the defendant, if he did so detain them, cannot afford any cause of action against the defendant under the proceedings in this cause.

Which were all given.

The jury found their verdict for the defendant.

The plaintiff, having unsuccessfully moved for a new trial, appealed.

*P. L. & J. P. Hudgens*, and *Doniphan & Field*, for appellant.

I. Appellant insists that the construction given by the court to sec. 4 of art. 11 is incorrect, and in violation of every known rule of statutory or constitutional construction.

It is a well established rule of construction that the whole Constitution, or all of the acts of the same Convention, must be construed so as to be consistent in all their parts; and if sec. 4 of art. 11 is susceptible of two constructions, only one of which is in harmony with the other parts of the Constitution, that construction must be adopted as the true one. This is an admitted rule of statutory construction. So long ago as *Rex v. Loxdale*, 1 Burr. 147, Ld. Mansfield said, when speaking of acts of Parliament, "that all which relates to the same subject, notwithstanding some of them may be expired or not noticed, must be taken to be one system and construed consistently." So Chancellor Kent, in the first volume of his *Commentaries* (p. 463-4) said: "It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.—Sedg. on Stat. & Const. Law. 237-8; *Commonw. v. Duane*, 6 Binn. 602; *Commonw. v. Alger*, 7 Cush. (Mass.)

It is also a settled rule of constitutional construction that the bill of rights is the governing and controlling part of a constitution, and all its general provisions are to be ex-

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pounded and their operations extended or restrained with reference to it—7 Port. (Ala.) 295.

It was therefore the duty of the court, in construing sec. 4, art. 11, to bring it in harmony with the other parts of the Constitution, and particularly with the Bill of Rights, as the controlling part.

But it is plain that the construction given by the court brings this section in conflict with the 7th, 15th, 16th, 18th, 28th and 32d sections of the Declaration of Rights of the new Constitution. Sec. 15 of the Declaration of Rights declares that "courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered without sale, denial, or delay": whereas this subsequent sec. 4 of art. 11 is construed by the court to close the courts of justice to appellant, and deny him any remedy for the injury to his person and property inflicted by the respondent under pretence of military authority.

Sec. 16 declares that "no private property ought to be taken or applied to public use without just compensation." Sec. 18 declares, among other things, that "no person can be deprived of life, liberty, or property, without the judgment of his peers or the law of the land"; whereas the court makes the subsequent section justify the seizure of appellant's private property without the shadow of compensation, and deprives him of liberty and property not only without, but against, the judgment of his peers, twice rendered in the cause. Nay more, it is made to declare that the right of property vested in the appellant in 1854 by contract, and confirmed in 1863 by the judicial determination of the courts and the judgment of his peers, under the law of the land then in force, were divested in 1865 by the legislative enactment or judgment of the Convention, usurping the functions of an appellate court and decreeing a forfeiture of his vested rights.

This construction impairs the obligation of appellant's contracts by retrospective operation, in violation of sec. 26, and

declares that the military is superior to the civil law, and that pretended soldiers may in time of peace be quartered in and even destroy the house of appellant without his consent and without regard to law, in violation of sec. 32, which declares that "the military is, and in all cases and in all times ought to be, in strict subordination to the civil power, and that no soldier can in time of peace be quartered in any house without the consent of the owner." Sec. 10 of art. 1 of the Constitution of the United States declares that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Sec. 7 of the Declaration of Rights of the Constitution of Missouri declares that "every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of this State in contravention or subversion thereof can have any binding force"; whereas the court construes the ordinance plead in bar of this action to be in contravention and subversion of sec. 10 of art. 1 of the Constitution of the United States, and yet have binding force. This brings us to the second proposition, viz. :

II. Sec. 4 of art. 11, or the ordinance plead in bar of action, as construed by the court, is a bill of attainder within the meaning of the Constitution of the United States, and of no validity—State v. Cummings, 36 Mo. 271.

"The question then is : Is the provision in the State Constitution referred to (the 3d article) justly obnoxious to these objections? It does not come within the legal meaning and sense of a bill of attainder ; for, as we have seen above, that is an act inflicting capital punishment. If, then, it is an infraction of the Constitution of the United States in this respect, it must be in the milder form of pains and penalties." "To be a bill of pains and penalties, it is necessary that it should judicially declare a person's estate confiscated, or create a forfeiture of some right, without giving him the opportunity of being heard in the judicial tribunals of the country. It must be a bill or law which by its own force and operation inflicts the wrong complained of."

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The Supreme Court of the United States, in reviewing this case, affirms this definition of a bill of attainder ; but came to a different conclusion in regard to the 3d article, which it declares to be a bill of attainder within the meaning of the Constitution of the United States, and of no validity. But the conclusion as to the 3d article is not material to the issue involved in this case ; all we want is the meaning of bills of attainder, and upon that both are agreed.

Having now ascertained that a bill of attainder, in the milder form, is a law which forfeits some right without giving an opportunity of being heard in the judicial tribunals of the country, let us examine and see if this sec. 4, as construed by the court, forfeits any right of the appellant.

It is admitted that appellant had the right to the property since 1854, by lease extending until 1874 ; that appellant obtained two judicial determinations of that right in this cause in 1863 ; that an appeal was taken by the respondent from these judicial determinations to the Circuit Court, and pending the appeal this ordinance, or sec. 4, was adopted by the Convention. Since the adoption of the ordinance, the court says by its instructions that appellant now has no right to the property, or that the respondent is protected by the ordinance in forcibly depriving the appellant of his property, and "the subsequent detainer of the property cannot afford any cause of action under the proceedings in this cause." Respondent has forcibly detained the premises now over six years, yet the court says, under the ordinance, this detainer affords no cause of action to the appellant. Why ? Because the ordinance, as construed by the court, deprives appellant of his right to maintain this cause of action which he possessed and enforced before the ordinance was passed. Not only this cause of action, but it deprives the appellant of the right to recover the property at any time in the future, because "the subsequent detainer affords no cause of action" says the court ; and if the subsequent detainer affords no cause of action, then appellant can never recover the property, and his right is thereby forfeited. It is then, as con-

strued by the court, clearly a bill of pains and penalties, prohibited by the Constitution of the United States, and of no binding force.

III. The ordinance, as construed by the court, is a law impairing the obligation of contracts, in violation of the Constitution of the United States, and retrospective in its operations, in violation of the Constitution of the State of Missouri, and of no validity.

As we have already seen, appellant's contract was made in 1854; the breach assigned was in 1861. This action was commenced in 1863, and judgment then rendered for appellant, from which respondent appealed; and subsequent to and pending the appeal this ordinance was passed in 1865, and the court now says appellant is deprived of his right of action by the retrospective operation of this ordinance.

In the case of *Dash v. Van Kleeck*, 7 Johns. 490, the Supreme Court of New York say: "It is not necessary to inquire whether a legislature can, by the plenitude of its power, annul an existing judgment. This power I should undoubtedly deny, because there then immediately arises a contract against the party adjudged to pay a sum of money in favor of him to whom it is awarded." At p. 496 of same case, Justice Thompson says: "Lord Coke lays down the rule to be (Co. Litt. 360, A.), that acts of Parliament are to be so construed as that no man who is innocent, or free from injury or wrong, shall, by a literal interpretation, be punished or endangered." He continues: "Giving to the act now under consideration a retrospective operation would manifestly be productive of these consequences; for it not only takes away a vested right, but punishes and endangers the plaintiff in the payment of costs. If his action is defeated and his right of recovery taken away by this statute, he not only loses his own costs, but will be obliged to pay costs to the defendant"—p. 498. He continues: "In the case of *Ogden v. Blackledge*, 2 Cranch, 272, in the U. S. Supreme Court, the effect and operation of an explanatory statute was under consideration. In that case as in this (continues Jus-

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tice Thompson, and so in the case at bar), the statute was passed after the commencement of the suit. And it was urged by counsel that if the suit had been brought after the passage of the explanatory act, it would not alter the past law and make that to have been law which was not law at the time. To declare what the law is or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all governments is that the legislative power shall be separate from the judicial; but that, at all events, the statute could not affect that suit which was brought before the law was passed. The court stopped the counsel, considering the question as too plain to be argued." Chief Justice Kent, in delivering his opinion in the same case (p. 500 et seq.), reviews at length the various English and American authorities upon the question of retrospective laws. After endorsing fully the opinion of Justice Thompson, at p. 508, says: "The judges of the Supreme Court of the United States, in the case of *Calder v. Bull*, 3 Dall. 386, speak in strong terms of disapprobation of such laws; and in *Ogden v. Blackledge*, 2 Cranch, 272, they considered the points too plain for argument, that a statute could not retrospect so as to take away a vested civil right.

IV. The 4th and 6th instructions asked by appellant, and refused by the court, give the proper construction of the ordinance, and their refusal was error.

Upon the examination of sec. 4 of art. 11 it will be seen that it declares that "no person shall be prosecuted in any civil or criminal proceeding for or on account of any act by him done, &c., by virtue of military authority vested in him by the Government of the United States or that of this State to do such act, or in pursuance of orders from any one vested with such authority."

The first question that naturally presents itself in the construction of this section is, what is meant by "military authority" vested in any one by the United States "to do an act" or command it to be done, and under what circumstances and when does the United States vest such authority

in any person? By assuming that the phrase "military authority" is used in the sense of rightful or lawful authority, as expressed in appellant's 4th instruction, there is no conflict with any other parts of the Constitution, and all is harmonious. The Government of the United States would not vest any person with wrongful authority, therefore it must have meant rightful authority.

These questions have been fully settled by the Supreme Court of the United States in the case of *Harmony v. Mitchell*, 19 Cond. 427. Mitchell defended upon the ground that he acted under the order of his superior in command; that the seizure was an urgent necessity for the public good, and to prevent the supplies from falling into the hands of the enemy.

Ch. J. Taney, delivering the opinion of the Supreme Court of the United States, says: "There are occasions in which private property may be lawfully taken or destroyed to prevent it from falling into the hands of the public enemy; also where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably the Government is bound to make full compensation to the owner; but we are clearly of opinion that in such cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for." Again he says: "But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say whether it was so pressing as not to admit of delay, and the occasion such, according to the information upon which he acted, that private right must for the time give way to the common and public good"—*Mostyn v. Fabrigas*, 1 Cowp. 180.

But in this case the defendant does not stand in the situa-

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tion of an officer who merely obeys the command of his superior; for it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belonged to an officer of inferior grade.

In the case of *Grant v. The United States*, tried at the October term, 1863, of the U. S. Court of Claims, Judge Wilmot, in delivering the opinion of the court, after stating that the claim was for private property of Wm. S. Grant, a contractor of the Government, destroyed and abandoned in Arizona, on the 15th of July, 1861, by order of Captain Moore, commanding U. S. troops in the vicinity of Tucson, says: "We must come to consider the necessity under which this property was destroyed. It is necessity alone that gives the right to take private property for use or destruction. The danger must be threatening, such as demands immediate action, and when delay would work public injury. Unless the necessity is such as to justify the officer, he is a trespasser, and there is no liability on the part of the Government. \* \* If however the danger, as he ought to have seen, was remote, the necessity not pressing, courts will hold him personally responsible to the party aggrieved."

The 4th instruction asked by appellant declares the law under which private property may be taken, as expounded in the foregoing cases by the highest tribunals of the Government, and appellant insists is the only admissible construction of the ordinance plead in bar. Apply this rule of construction: did the respondent do the act by virtue of military authority vested in him by the United States, or in pursuance of an order from one vested with such authority? To be vested with or have such authority, there must have been urgent, immediate and impending necessity, such as would not admit of delay. Unless such existed, the officer had no authority to do the act, or command it to be done, and was a trespasser and personally liable as such. If the necessity existed sufficiently to justify the officer, his authority to do the act was rightful and the liability of the Government established; and the provision in the Bill of

Rights, providing that private property shall not be taken without compensation, is saved, because the Government is bound to make compensation for property rightfully taken by its authority. The principle that an illegal order of a superior to an inferior officer is no justification to such inferior or subordinate officer, has long been recognized in cases of civil officers—10 Pet. 81; Sedg. Dam. 486.

The respondent claims to have been in June, 1861, the colonel of an organization called "Home Guards." This organization was without warrant or authority of law. There was not then, nor is there now, any law of the United States or of this State authorizing any such organization. It was assumed voluntarily upon the part of the respondent, and, being without authority of law, the respondent could not in any sense have military authority to do the act complained of, when he had no rightful authority whatsoever to do any military act on behalf of the State or United States. He voluntarily assumes to be colonel, then assumes the right to tear down his neighbor's house, and destroy the premises, under the pretext that the Government of the United States wanted this 30 by 140 feet of ground to drill his undisciplined, self-constituted organization. The Government did not know of any such organization at the time, and has never recognized it since.

V. The court erred in refusing the proofs of respondent's acts prior to 15th June, 1861—these acts were competent to show that the act complained of was not the act of, or authorized by, the State or United States—and in refusing the 6th instruction, which was intended to preserve the exceptions more specifically.

The ordinance had been plead in bar, and appellant offered testimony of respondent's threats to "fix appellant," Drehman, if he did not surrender the premises, and tending to show Stifel's efforts to get possession of the premises before he assumed to be colonel or was connected with this assumed military organization. The testimony clearly showed that it was an act of Stifel for his own individual benefit, contem-

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plated long before the military pretext was conceived, and in no sense an act authorized by the Government. It was also competent to show the motives and circumstances that surrounded the respondent at the time of the act. But the only evidence on record in regard to any military order is that of the witness Bissell, who testifies that Col. Stifel requested or suggested to him to get Gen. Sweeny to issue this order; and he testifies that it was merely a verbal order, given on the suggestion of the respondent, and amounts to nothing more than a verbal permit from one without authority to commit a trespass.

It is claimed by the respondent in this case, and the court sustains the assumption, that an assumed or real military officer has the power in this civilized country to dispense permits or indulgences to his subordinates to appropriate to themselves or destroy their neighbor's property at pleasure, without any responsibility to anybody—permits to trample on the Constitution and sacred rights of the citizen—permits to destroy the foundations of the Government they claim to support, and establish on its ruins a military despotism in which every assumed military gentleman is an absolute tyrant. Such is not the law, nor is it a proper construction of the ordinance or section of the Constitution plead in bar of this action. It must have been intended to declare the common law rule as given by Ch. J. Taney and Judge Wilmot in the case above referred to. Any other construction does violence to the intelligence of the Convention that formed the Constitution, and establishes in the future a military despotism instead of a constitutional republican form of government, which, in the opinion of Ch. Justice Taney, delivered in 7 How. (U. S.) 45, "it would be the duty of Congress to overthrow," under its constitutional power and duty to guarantee to each State a republican form of government.

*Jecko & Clover*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was an action of forcible entry and detainer upon a complaint made before a justice of the peace under the statute. The case comes here by appeal from the St. Louis Circuit Court. The proceedings were commenced in September, 1863. After several trials before the justice, and a recovery, at last, of some \$7,000 damages, an appeal was taken to the Circuit Court, where it was tried again in May, 1866, after the passage of the ordinance of 1865, relating to such suits, which had been pleaded in bar, and a verdict and judgment were rendered for the defendant. The questions for consideration here arise mainly upon the instructions which were given or refused by the court below.

Divested of all extraneous irrelevant matters, the substance of the case made on the facts may be stated as follows:

Sometime in the first half of June, 1861, during the first uprising of rebellion in Missouri, and in a time of civil commotion, great peril and actual war, while General Lyon had command at the Arsenal and post of St. Louis, a regiment of Home Guards under Col. Stifel (the defendant here), by order of the commanding officer of the post, occupied a certain brewery building in the tenth ward of the city as their camp and head-quarters, and as a position for the defence of the city and the protection of the community against insurrectionary violence. This brewery belonged to the defendant. A two-story building on the adjoining lot, belonging to the plaintiff, had twice taken fire and was partly burned, and, being rendered untenable, was vacated by the plaintiff, who left the premises under the charge of an agent residing in the neighborhood. Nobody was in the actual occupation of the premises. Upon a suggestion made by the defendant, as colonel in command, to the commanding officer at the Arsenal, his adjutant was sent to examine the premises, with a view of putting the position in a state of military defence

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(as the adjutant himself states) and to report their condition. Upon the report of this officer a positive verbal order was given to him by the general in command, to examine the place again in company with the general officer commanding that immediate district, and, with his approval, to have these burnt ruins pulled down and removed, and to have all the grounds adjoining the building smoothed off for a parade ground and other military uses. After consulting fully with the general and other regimental commanders as to what was necessary to be done (as he says) with reference to putting all the posts in a state of military defence, the order was given to the defendant, under which, as expressly directed, he seized the premises for the public use, and proceeded to remove the ruins and clear the ground. The premises were occupied by this regiment for some time, but were evacuated by the military forces before the first day of January, 1862, and were not, after that date, claimed or occupied by the defendant, though the enclosure erected by the military authorities still remained there.

The plaintiff offered some evidence tending to show that the defendant owned the brewery, and had some time previously purchased the reversion of the plaintiff's lease of this lot, had refused to accept rent from the plaintiff, and had desired to purchase his lease. This evidence was properly excluded as irrelevant and immaterial. It had no direct bearing upon the issue, and could only tend to mislead the jury. Some slight circumstances having a like tendency were stated by some of the witnesses for the plaintiff, upon which his counsel have endeavored to construct a theory respecting the conduct and motives of the defendant, which, so far as we are able to discover from anything contained in the record, would seem to be in great part imaginary or wholly unfounded, and not at all warranted by the evidence produced, to the effect that the military order was procured by the defendant for a malicious or selfish purpose, and was a mere cover for his own private ends, and that the acts done were not done by virtue of any lawful military authority, nor

upon any immediate and pressing danger, or upon any urgent necessity for taking private property for public use, but were an arbitrary abuse of military power, and, in fact, a lawless invasion of private property for individual purposes, without any military authority whatever. The plaintiff appears to have proceeded on the assumption that the Home Guards were an unauthorized military force, and that the acts of these officers were to be regarded as trespasses and forcible entries, and that the personal relations and individual transactions of these parties were admissible in evidence on the issues in the case. It is not apparent how the justification of a military officer for acting in obedience to positive orders can in any manner depend upon his private relations with the parties whose property happens to be taken for public use. We deem it unnecessary to dwell upon this part of the case. It is not otherwise important than in reference to the instructions. We are not well satisfied that there was any competent evidence before the jury which could have warranted them in finding the fact according to the theory supposed, but the instructions will be considered on the supposition that there was some evidence tending that way.

The principal instruction refused for the plaintiff proceeds upon the law, as it was laid down in *Harmony v. Mitchell*, 13 How. (U. S.) 115, that the existence of some pressing danger or urgent military necessity was a question of fact for the jury to determine.

The defendant's instructions, which were given, appear to have been framed with reference to the ordinance passed in Convention on the 17th of March, 1865, and subsequently incorporated into the Constitution of the State—Const. art. 11, § 34. It reads as follows:

"No person shall be prosecuted in any civil action or criminal proceeding, for, or on account of any act by him done, performed, or executed, after the first day of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the Government of the Uni-

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ted States, or that of this State, to do such act, or in pursuance of orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall be hereafter instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof."

The purport of these instructions was, that nothing was to be left to the jury to find, but the fact, whether or not the acts of forcible entry and detainer complained of were done after the first day of January, 1861, and by virtue of military authority vested in the defendant, or in pursuance of an order received by him from a person vested with such authority under the Government of the United States; that it was immaterial, in such case, at whose instance or under what circumstances of military necessity the order was issued, and that if the acts were done by virtue of such military authority, or in obedience to such orders, it made no difference whether or not an urgent or pressing military necessity were otherwise proved; in short, that the existence of a military necessity in such cases was not a matter of fact for the jury to determine, but a matter of law for the court under this ordinance, and upon the evidence adduced.

So far as this ordinance affects the plaintiff's case, it may be conceded that it operates to make such military orders and authority a complete justification for the acts done by the defendant in pursuance thereof, and to take away from the jury all consideration of the question whether there existed, in fact, any immediate and pressing military necessity for the issuing of such orders, and that it so far deprives the plaintiff of any right to recover damages from the defendant for acts done by virtue of such military authority, or in obedience to such orders; but the questions whether such military authority or orders existed, in fact, or whether the acts complained of were actually done by virtue of such authority or orders, or whether they were done maliciously or for private and selfish ends, using the authority or orders as a mere pretence or cover, or were an arbitrary abuse or a wil-

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ful misuse of power for other purposes than those contemplated by such authority or orders, may still be a matter of fact for a jury to determine, under the ordinance.

So far as the ordinance operates retroactively upon the plaintiff's case, it may be said to deprive him of his right to recover, but it does not take away nor infringe any vested right of property. A right to recover damages in an action of forcible entry and detainer is not a vested right of property.

The Federal Constitution does not prohibit a State from passing retrospective ordinances of a civil nature, which merely take away a right of action or only divest rights vested by law in an individual, if it does not impair the obligation of a contract, nor divest settled rights of property. The ordinance is not, therefore, in this respect unconstitutional—*Calder v. Bull*, 3 Dall. 386; 2 Sto. Const. § 1398; *Smith's Com. Const. Law*, §§ 266, 267, 378. That it is a bill of attainder, as contended, there cannot be any rational pretence. There is nothing in it that relates to proceedings of a criminal nature in the sense of a bill of attainder, nor does it confiscate private property, nor punish anybody. It is rather an act of indemnity, oblivion, and pardon; of *indemnity*, in so far as it makes military orders and authority a justification for acts done by virtue thereof; of *oblivion* and *pardon*, in so far as it prohibits criminal prosecutions for acts done by such authority. It is not necessarily inconsistent with anything contained in the bill of rights in the same Constitution. The Legislature, only, is prohibited from passing retrospective laws (Art. 1, Const., § 28); this is an ordinance of the people in their sovereign capacity, founding a civil government. They had the power to define how much of the rights and liberty of the citizen he should be required to surrender for the public good, and there was no other limit of positive law upon this power but the prohibitions of the Federal Constitution, which do not reach this case. If this ordinance be deemed an unwise abridgement of the rights and liberties of the citizen, or whenever it shall be thought to operate op-

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pressively or unjustly, the remedy lies with the people in the power of amendment. We have only to declare the law as we find it.

There is no evidence of any actual appropriation of the plaintiff's property beyond the military occupation of the premises and the waste committed in clearing the ground for the use of camps and quarters. When the military occupation ceased there was nothing to prevent the plaintiff from retaking possession; or, if any private individual retained the possession, he had his action of unlawful detainer, on demand made in writing under the statute, or his action of ejectment to recover the possession. His right of property in the lease was not taken away. The military possession for the public use was merely temporary. For this use of his lot, as well as for the value of the property destroyed, he was entitled to look to the Government for compensation. He seems to have preferred to consider the whole proceeding as an individual trespass, a forcible entry and detainer by a private person, and an unlawful appropriation of the property in his individual capacity and for his own purposes, and wholly to ignore the military authorities. It is not a little remarkable that he should neglect to make an effort to regain the possession when the military forces evacuated the premises, but should resort to this form of action against the defendant nearly two years after that event. He is now seeking to recover, by way of damage, double the amount to be assessed as damages for the forcible entry and detainer, for the value of the property wasted, and for all rents and profits up to the finding of a verdict, under a statute which was made for the protection of the citizen against forcible invasion of private property by an individual, acting altogether without any authority of law.

Now, it would seem to be reasonable that, in order to make this statute applicable to a military officer acting under express orders from the highest military authorities, in time of civil war, and under circumstances of great public peril, in

the midst of a treasonable insurrection, when speedy action and the utmost energy were required, the clearest proofs of the want of lawful authority, of an arbitrary abuse of power, and a plain perversion of military orders to malicious purposes, or selfish private ends, ought to be demanded. Even if this were a case in which the existence of pressing danger or urgent necessity were to be submitted to a jury as a matter of fact, where the officer produces unequivocal evidence of both military authority and express orders for what was done in justification of his acts, something like direct and positive evidence to the contrary ought to be expected. It may be that the plaintiff was not aware of any urgent necessity. A sagacious military commander is apt to see necessities that are not apparent to everybody. It is probable that there were a great many who saw no military necessity for the capture of camp Jackson, but a short time before this transaction, until long after it was taken. The mere fact that personal relations of no very friendly character existed between these parties, or that the defendant was personally interested in this property, while it may tend to explain the course taken by the plaintiff, furnishes no satisfactory evidence of an abuse of power for private ends; nor was there any evidence tending to show that no such military exigencies existed, or that these premises were not needed for the public use. On the other hand, there was direct and positive evidence that two military officers, besides the defendant, on personal inspection of the position, made report of the military necessity of what was ordered to be done. Not only the existence of the military orders, but the existence of the military necessity which justified them, was distinctly proved.

There is a wide difference between this case and those which have been cited on behalf of the plaintiff. Where a naval commander under the orders of the admiral had pulled down the houses of some sutlers, who sold liquors to the sailors, on the coast of Nova Scotia, he was held liable to an

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action for damages, because there was not the slightest pretence of any military necessity, nor was the act within the scope of military authority—1 Cowp. 180.

In *Mitchell v. Harmony*, 13 How. (U. S.) 115, there was no pressing danger from the enemy, nor any occasion whatever for taking the private property for public use, but it seems to have been seized because it was thought it might contribute to insure the success of a distant expedition on which the officer was about to march. The jury had found the fact to be so, and the court held this was a question of fact for the jury to determine. The orders were proved, but the evidence showed that neither the orders nor the act were justified under military authority in that state of the case.

This verdict might stand upon the law as laid down in that case, if it had been found under instructions to the same effect. It recognized the law to be, that a military officer, charged with a particular duty, might impress private property into the public service, or take it for the public use, and that the Government would be bound to make compensation; but that the officer should not be regarded as a trespasser when an urgent necessity was shown to exist, and that he would be justified in acting upon the information of others, as well as his own observation, affording a reasonable ground of belief that the peril was immediate or the necessity urgent, though it should turn out to have been erroneous or unfounded, and that he would not be a trespasser; but it was also held to be a matter of fact for the jury to determine, whether such emergency existed or not.

Now, the only effect that need be given to the ordinance, in order to make it cover this case, and justify the instructions which were given for the defendant, is this: that when the military authority and orders are made to appear, the existence of the emergency or military necessity shall be deemed to be conclusively proved and established by the judgment of the officer, and shall be presumed as a matter of law. It operates so far to change the rules of evidence. It makes that a justification and a defence which would not

have been such before without further proof. In this, it is not unlike those statutes which make certain facts proven to have the effect to raise a conclusive presumption of negligence or liability. The military necessity only is thus conclusively presumed, but the questions whether the military authority or orders existed in fact, or whether the acts complained of were really done by virtue of such authority, or were the acts of the individual in his private capacity, or were an abuse of power or a perversion of orders for private ends or malicious purposes, would be still open for determination by the jury. The evidence thus far makes a change in the law as it stood before, but we do not think it is for this reason unconstitutional.

The first three instructions which were given for the defendant, left to the jury to say whether these officers had military authority under the United States, and whether the acts of the defendant in the premises were done in pursuance of orders issued by such authority. They took away from the jury the consideration of the military necessity and nothing more. We think the instructions were correct, and that the verdict was fully justified by the evidence.

The fourth instruction for the defendant proceeded upon the ground that a detention of the premises by the defendant, as a private individual, after the military evacuation, would be an unlawful detainer only, and would not sustain an action for a forcible entry and detainer. In such case a demand in writing for the possession and a refusal would be necessary to give a cause of action under the statute. Such detainer would only amount to a disseizin—27 Mo. 377; R. C. 1855, p. 787, § 3. We see no material objection to the instruction.

The fourth and fifth instructions, which were refused for the plaintiff, are sufficiently disposed of by what has been said above.

The sixth instruction was rightly enough refused, for the reason that the military authority was amply proved, and there was no evidence to the contrary, and though it might

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have been given, its refusal could do no prejudice to the rights of the plaintiff. The same question of fact was submitted to the jury in the instructions which were given. There was no error in this of which the plaintiff can complain.

As to the plaintiff's seventh instruction, it may be observed that no objection was taken in the course of the trial to the admissibility of the evidence that was produced by the defendant to prove the military authority and the orders, and being once admitted without objection, even if any valid objection could have been taken, the court very properly refused to exclude it from the jury by an instruction at the close of the case.

The eighth instruction refused needs no further consideration. There was no possible ground on which the ordinance could be called a bill of attainder.

There being no error that can entitle the plaintiff to a reversal, the judgment will be affirmed. The other judges concur.

[END OF MARCH TERM, 1867.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
JULY TERM, 1867, AT JEFFERSON CITY.

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STATE *ex rel.* ATTORNEY-GENERAL, Plaintiff, *v.* WM. HIXON,  
Defendant.

1. *Officer—Misdemeanor in Office—Clerks.*—It is the duty of the justices of the County Court to know their own power and jurisdiction, and not the duty of the clerk to inform them; he is bound to obey the directions of the justices sitting as a court and acting upon matters coming within their general jurisdiction, and to enter such orders as they may make while they continue in office; he is not responsible for their errors or mistakes of law, nor for any official misconduct on their part, and the entry of orders made by them is no violation of his duty although the orders be illegal. The charge of misdemeanor in office preferred against the clerk of a court, under the statute, must be confined to his official action. To establish the charge, the conduct of the officer must be shown to have been wilful or corrupt; error in judgment merely, or ignorance or mistake of the law, is not enough, unless it be so gross as to show him to be entirely unfit for the office, and to render his tenure of office dangerous to the community.
2. *Courts—Sessions—Jurisdiction.*—The meeting of the judges to hold a session of the court in vacation, or on a day to which they have not adjourned, is illegal, and the action of the judges is invalid.
3. *Officers—Tenure of Office—When authority ceases.*—When officers are elected or appointed to hold office until their successors are duly elected, commissioned and qualified, their authority does not cease until they are notified in some way that their successors are duly qualified, and their acts as a court *de facto* will be deemed valid until such notice is given.

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*On charges preferred of Misdemeanor in Office.*

HOLMES, Judge, delivered the opinion of the court.

This is a proceeding under the statute in relation to clerks of courts (G. S. 1865, ch. 24, §§ 18-24), upon charges exhibited by the Attorney-General against the defendant for misdemeanor in office as clerk of the County Court of the county of Lafayette.

The *first charge* was, that the said William Hixon, clerk of the County Court aforesaid, did, on the 1st day of December, 1866, while acting as such clerk, knowingly and wilfully, in violation of law and of his duty as such clerk, issue certificates of election to certain persons named as county officers, and to himself as clerk of the County Court of said county, well knowing that, long prior thereto, the former county clerk had, in conformity with law, duly issued certificates of election to other persons entitled in law to said offices.

The *second charge* was, that the said clerk did knowingly, wilfully and unlawfully make and enter upon record an illegal and fraudulent order, in violation of his duty as clerk, pretending to approve the bonds of the collector and treasurer of said county at the direction of the former justices of said court, after the expiration of their offices and after their successors had been duly commissioned and qualified, and had entered upon the duties of their offices; the said Hixon well knowing at the time when he entered said order that said persons were not then the justices of the County Court, and were not sitting as a court, and had no authority or right to make such order; which acts were in violation of law and of his official duties as clerk, and were a misdemeanor in office.

To these charges the defendant pleaded "not guilty"; and the cause was submitted to the court for its determination upon the evidence adduced.

The court finds the essential facts to be, that, on the 24th day of December, 1866, at a session of the County Court of the county of Lafayette, begun and held on the 19th day of

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that month, the court proceeded to examine the legal votes cast at the previous November election, and, it being ascertained by the court that certain persons named had been elected to fill the respective county offices, it was ordered that certificates of election be given to them under the seal of the court, and the whole legal vote was ordered to be certified to the Secretary of State; that all this was done by the clerk accordingly; and that the court adjourned to meet the 27th day of December following, and then adjourned again to the 7th day of January, 1867; that on the 4th day of January, after their last day of adjournment, a session of the court was called and held by the same justices, at which the defendant was present as clerk, and that at this session the court approved the bonds of the collector and treasurer of the county, and directed the clerk to enter the order, which, in obedience to such direction, was entered of record on the same day, saying that said bonds "were approved by the court in vacation."

We further find that commissions had been issued to the newly elected justices of the County Court of said county, dated the 28th day of December, 1866, and that the justices had received their commissions on the 30th day of December following, and had taken the oath of office on the next day thereafter; that on the same day one of the justices showed his commission to the defendant, and informed him that he supposed the other justices had also received their commissions; that the newly elected justices met and held a session of the court on the 5th day of January following, and then exhibited their commissions, directed them to be recorded (which was done), and entered upon the discharge of their duties as such court; and that when the former justices met on the 4th day of January previous, they had received no notice, and had no knowledge that the newly elected justices had received their commissions and been duly qualified.

The meeting of the justices to hold a session of the court in vacation, or on another day than that to which the court had been adjourned, was illegal. Where a resignation of an

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officer had been accepted by a judge in vacation, and the clerk had made the usual entry in pursuance of an order of the judge, when by law such resignation could be accepted only by the court in term time, the acceptance by the judge in vacation was held to be a nullity—State v. Brown, 12 Ohio, 614. But no intimation was given in the case that the clerk was guilty of any misbehavior in making the entry as ordered by the judge. If the court had been adjourned to meet on that day, their acts might have been valid as a court *de facto*, though the newly elected justices had already received their commissions and been qualified. They held their offices until their successors should be duly elected, commissioned, and qualified. In such case, though their powers may have ceased and determined *de jure*, the general rule would seem to be that they could be justified in continuing to exercise the duties of their office until they had received knowledge, or some kind of notice, of the fact that their successors had been duly commissioned and qualified; and their acts as a court *de facto* would, in such case, be deemed valid.

It has been decided that where an office is held *during pleasure*, a removal by the appointing power will not be completely effected until notice is actually received by the person removed; and the officer will be entitled to act until he receives notice of the revocation of his authority—Bowman v. Slifer, 25 Penn. 23. Where by the terms of the statute the office is to cease and be vacated on a day fixed, the case is quite different. It has been held that when a judge has received his commission and taken the oath of office, and had it endorsed upon his commission, he is then the *incumbent* in office, and not before—Ramsey v. Riley, 13 Ohio, 157. This is no doubt true so far *de jure*; but, in this case, the question when the authority of the former officers shall absolutely cease is made by the statute to depend upon a matter of fact, which must be brought home to them by some manner of notice. The law alone does not give them this information. When the newly elected justices appeared on a day appointed for a session of the court, exhibited their commissions and

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caused them to be recorded, and formally entered upon the duties of their office, this fact, being of a public nature, might very well be deemed to be public notice to all the world. We do not say that this kind of notice was necessary; but until the former justices had received some knowledge of the fact that their successors had been commissioned and qualified, and that their own powers had come to an end, we are inclined to the opinion that their acts as a court sitting *de facto*, if not *de jure* also, would be valid and effectual. The error into which these justices appear to have fallen was, that they undertook to hold a session of the court on a day to which the court had not been adjourned. It was not made to appear in this case that any special term of the court had been ordered according to law (G. S. 1865, ch. 137, § 19) for the 5th day of January, when the new court met; nor by what legal authority a session was held on that day, when the court had been adjourned to the 7th day of that month. The subject is referred to merely for the purpose of indicating how easily the justices, who are not necessarily supposed to be lawyers by profession, might honestly fall into error in this matter.

It was the duty of the justices to know their own powers and jurisdiction, and not the duty of the clerk to inform them. The clerk was in duty bound to obey the directions of the justices sitting as a court, and acting upon matters which came within their general jurisdiction, and to enter such orders as they saw fit to make while they continued in office. He was not responsible for their errors or mistakes in law, nor for any official misconduct on their part; and there was no violation of his duty in making such orders, though the orders may have been nullities in law.

The charge of misdemeanor in office must be confined to his own official action as clerk; his conduct in his private capacity is not in question; and he is not responsible for the misconduct of others, but only for his own—Commonw. v. Barry, Hardin, 229. It was not the business of the clerk to know when the newly elected justices had been commissioned

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and qualified ; nor was it his duty to inform the other justices when their official functions had come to an end. This was not a matter pertaining to the office of clerk. Whatever may have been his obligation as a private individual, the simple fact that he had seen the commission of one of the justices, and been informed that the others had probably received theirs also, and that he had not communicated this information to the other parties, cannot therefore be imputed to him as a violation of law, or of his official duty.

To establish the charge of misdemeanor in office, the conduct of the officer must be shown to have been wilful or corrupt. Error in judgment merely, or ignorance or mistake of the law, is not enough, unless it be so gross as to show him to be wholly unfit for the office, and to render his tenure of the office dangerous to the community. In the case of *Barry, Hard. 229*, it appeared that the clerk had made alterations and erasures in official papers in his custody, for his own personal advantage, and in gross disregard of the known duties of his office ; and the acts done were deliberate, voluntary, and unlawful. His conduct being both wilful and corrupt, amounted to a misdemeanor in office. It is implied in every office that the holder will execute it diligently and faithfully ; and he is liable to a forfeiture of the office not only for doing a thing directly contrary to the design of it, but also for neglecting to attend to its duties—1 *Hawk. P. C. 310*. But there must be something like wilful abuse, or corrupt and impure motive—*Commonwealth v. Arnold, 3 Litt. 309*. All wilful breaches of the duties of an office are not only forfeitures of the office, but punishable by fine as misdemeanors—7 *Bac. Abr., tit. Offices, N. (Bouv.) p. 325*. In criminal proceedings, ignorance or misinformation in matter of law may be taken into consideration by the jury in determining the intent and character of the acts, where the intention is the gist of the offence ; and the party charged may show in defence that he acted honestly under a misapprehension of the law—1 *Bish. Cr. L., § 378*. That the

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acts done were invalid in law, is not enough to show a wilful violation of duty.

The evidence fails to establish anything like wilful abuse, or corruption, or gross and wilful misconduct, in the performance of his special duties as clerk. It does not appear that he received any personal or pecuniary advantage from the acts complained of, nor that he had any sufficient motive for corrupt action. In the first charge it is averred that he issued a certificate to himself among the rest of the county officers named. These certificates were all issued together by the express order of the court, which he was justified in obeying in his own case as in all the rest. We see no reason for charging him with any corrupt motive in this matter; and the first charge was abandoned at the hearing.

The defendant is not on trial for any damage or injury suffered by any private individual by reason of alleged misbehavior on his part: it is the State that complains. The statute contemplates such misbehavior as would render him unfit or unworthy to be entrusted with the duties of a public office. We see nothing in the evidence produced that would justify us in finding him guilty of so serious a charge. When the justices required his attendance as clerk at a session of the court on a day to which the court had not been adjourned, we think he may be excused for complying, and that the justices alone are responsible for the error or misconduct in holding such illegal session; and that when the court directed him to enter the orders which were made, he is not justly chargeable with a wilful and corrupt violation of law, or of his official duty, in making such entries, though the error in law of *a court sitting in vacation* appeared on their face. It was for the justices, and not for him, to judge of such matters. He was acting within the scope of his ordinary duties, and was responsible in this only for conduct resulting from corrupt motives—*Stewart v. Southard*, 17 Ohio, 402. This view would seem to be more especially just in reference to the first charge, when the court was legally in

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session, though having no lawful jurisdiction over the matter in hand, which was not before the court in the form of a contested election; for it was clearly the duty of the clerk to obey the orders of the court without undertaking himself to decide upon their jurisdiction in the case; and we think the same principle applies as well to the other charge, where the court had clear jurisdiction over the subject in hand, though the session were not held in conformity with law.

With these views of the case, we must find the defendant not guilty. He is therefore acquitted, and will be reinstated in his office; and it is ordered that the costs shall be paid by the County of Lafayette. All the judges concurring.

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STATE *ex rel.* ATTORNEY-GENERAL, Plaintiff, *v.* WILLIAM H. BOWEN, Defendant.

1. *Officers—Clerks, Duties of.*—The duties of the clerk of a County Court are essentially ministerial; so far as the entering of the orders of the court are concerned, or the performance of any other act which may be legally or properly required of him by the court, he is without discretion; he has no power to judge of the matters to be done, and must obey the mandates of the tribunal whose officer he is.
2. *Officers—Clerks of Courts—Misdemeanors in Office.*—The refusal of the clerk of a County Court to produce the books and papers in his office before the court for its inspection and action thereon, when thereto required, is a misdemeanor in office.

*Misdemeanor in Office.*

FAGG, Judge, delivered the opinion of the court.

This is a prosecution against the defendant as clerk of the County Court of Lafayette county for misdemeanor in office. It is instituted by the Attorney-General upon the request of the County Court of said county in the manner authorized by chapter 24 of the General Statutes of 1865.

The newly elected justices of the County Court for said county after receiving their certificate of election, but without commissions from the Governor, as required by law,

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met and assumed to discharge the duties of their said offices. The election was held on the 6th day of November, 1866, and the meeting took place on the 17th day of the same month.

*First*—It is charged that the defendant, then acting as clerk of said court, did knowingly, wilfully and unlawfully deface the record books of said County Court by entering therein the proceedings and orders of Jesse Schofield, W. S. Thomas, and A. W. Litton, who thus assumed and pretended to be acting as said justices, well knowing that they had not been commissioned by the Governor of the State.

*Second*—That defendant did, at same last mentioned date, upon the order of the persons so assuming and pretending to act as justices of said County Court, knowingly, wilfully and unlawfully issue commissions to certain officers of Lafayette county.

*Third*—That at the December term, 1866, of the County Court of said county, the said defendant “did knowingly, wilfully and unlawfully retard and prevent the lawful business of said County Court from being done, by failing, neglecting and refusing to produce into said County Court, then being in session for the transaction of business, as it lawfully might, the necessary books, papers and records of said County Court, when thereto lawfully required, and left and abandoned said County Court at the term thereof aforesaid, and remained away therefrom in contempt of said court and greatly to the injury of the people of Missouri,” &c.

The reply of the defendant to the first two charges substantially admits the facts charged in the complaint, but avers that the said Schofield, Thomas and Litton were at the time duly authorized to act as justices of the County Court without commissions from the Governor, and that he was guilty of no offence against the law by acting in obedience to their orders.

There is also a denial of the third charge, with an averment that on the day of the meeting of the County Court in December, being the 3d day of the month, the defendant

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was violently assaulted in his office by an armed band of ruffians; that he was cruelly beaten so as to be unfit for business for many weeks, and compelled to leave his home in the town of Lexington in order to save his life. That James Chaney, John Kirkpatrick, and Thomas Wernwagg, who were the acting justices of the County Court of said county previous to the general election on the said 6th day of November, met on the said 3d day of December, 1866, and "under the power of an armed band of men again undertook to act as the County Court of said county," &c. It is further stated that defendant's son was at the time his deputy in said office, and that he remained in charge of the same ready and willing at all times up to the 17th day of December, 1866—at which time he was driven off by an armed band of men—to discharge all of the duties of the office, and in all things to obey the orders and requirements of the County Court of said county.

The facts found by the court upon the trial are, substantially, that the justices elected on the 6th day of November, 1866, met on the 12th day of said month and determined the length of their respective terms by lot. The proper facts were certified to the Governor, but no commissions were issued to them until the 28th day of December following. They met again on the 17th day of November, and proceeded to discharge the duties of a County Court, at which time the entries were made and the acts done as charged against the defendant.

It is apparent that the two first charges may be considered together, as both really depend upon the settlement of the same question. The office of the clerk of the County Court is essentially ministerial in its character. So far as the entry of the orders of the court are concerned, or the performance of any other act or thing which may be legally and properly required of him by the court, he is without discretion; he has no power to judge of the matter to be done, and must obey the mandates of the tribunal whose officer and servant he is. It will be seen at a glance that here was

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a contest between two bodies, both claiming to be in contemplation of law the County Court of Lafayette county. There is nothing in the character of the office itself, or the laws of the State defining and regulating its powers and duties, which could authorize the clerk to sit in judgment for the purpose of deciding it. The legality of the proceeding of the court in no way depended upon his opinion as to who was rightfully holding the office of county justices of Lafayette at the time his acts are complained of. If the orders and proceedings entered by the clerk under the direction of the persons thus assuming to act as justices of the County Court were not authorized by the law, they are to be treated as mere nullities, but not as a mutilation or defacement of the record. So far as these two charges are concerned there is nothing in the testimony to show that the defendant acted wilfully or corruptly, and he must be found "not guilty" on both.

The third charge involves not only the question of the right of these two opposing bodies legally to discharge the duties of a County Court, but also the liability of this defendant for the acts of his deputy. The first of these questions arose in the case of State ex rel. Att'y-Gen'l v. Hixon, decided at the present term of the court, and need not be discussed again. It was the justices composing the old court who met on the 3d day of December, 1866, and demanded of the deputy clerk the production of certain records and papers belonging to the office, which demand is alleged to have been disregarded. These justices were rightfully exercising the powers pertaining to their offices. It is shown that the commissions issued to their successors were not received until the 30th day of the same month, and that two of the newly elected justices qualified on the succeeding day; the other, some time afterwards. The demand made upon the clerk through his deputy was not complied with. There was an absolute refusal on his part to obey the orders of the court, and by him stated to be under the express direction and authority of the principal. The liability of the clerk in

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this case is clearly fixed by the fact of an express order and direction to his deputy. It is not necessary that the facts accounting for the absence of the clerk on that occasion should be considered at all. We think that the proof fails to sustain the averments in the defendant's answer as to the facts of his being driven from his office and home by an armed force. This, however, is not material. His deputy remained in the undisturbed possession of the office so far as the proof shows, and he was expressly charged by the defendant not to deliver up certain records and papers in his custody even for the inspection of the County Court itself. A part of these papers were the poll-books of the county used at the election held on the 6th day of November, 1866. This was a wilful refusal upon his part to perform a duty clearly incumbent upon him, and must have proceeded from a motive wholly inconsistent with his duties as a public officer. It is an offence of a grave and serious character, and one that the interests of the public requires should be punished.

The defendant must be found guilty upon the third charge. His office having expired by limitation on the first day of January, 1867, his punishment will be assessed at a fine of one hundred dollars, with the further order that he pay the costs of this proceeding. The other judges concur.

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STATE *ex rel.* THOMAS ADAMSON, Petitioner, *v.* THE LAFAYETTE COUNTY COURT, Respondents.

1. *Mandamus—Jurisdiction—Ministerial Acts.*—The writ of *mandamus* lies either to compel the performance of a ministerial act, or is addressed to subordinate judicial tribunals requiring them to exercise their judicial functions and give judgment in cases before them. It will not lie to compel an inferior tribunal to give a particular judgment nor to reverse a decision already made; its office being to prevent a failure of justice from delay or refusal to act.
2. *County Courts—Jurisdiction—Ministerial Acts—Offices—Collector—Revenue.*—In approving of the bond of the sheriff as collector of the State and county revenue, the justices of the County Court act in a ministerial, not in a judicial capacity. Their discretion is confined to an examination of the sufficiency of the security offered, and that must be a sound legal discretion, not capricious, arbitrary, nor oppressive.

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State ex rel. Adamson v. Lafayette Co. Ct.

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*Petition for Mandamus.*

*Chester Harding, Jr.*, for petitioner.

I. This court is the general guardian of public rights, and, in exercise of its authority to grant the writ, will render it, as far as it can, the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right. The right of the court to apply this means for the attainment of such end, and to prevent that defect of legal justice which might otherwise ensue, has been generally admitted—Tapp. on Mand. 9 et seq., and authorities there cited; R.R. Co. v. Comm'rs Clinton Co., 1 Ohio, 77.

In this case there is no specific remedy for the wrong complained of, other than the writ of mandamus. An appeal from the orders of the County Court, in the premises, would not lie—Hixon's case, *ante* p. 210.

No suit for damages against the individuals who compose the County Court, if such suit could be maintained, would suffice to enforce the petitioner's legal right to the office of the sheriff. Moreover the office is of a public character, in which the people of the county are interested as well as the petitioner.

II. This court has the power to supervise and correct the proceedings of the County Court, notwithstanding the discretionary power confided therein as regards the approval of the collector's bond, provided that the power is shown to have been abused. The discretion spoken of must be a sound legal discretion, and must not be used in an arbitrary, corrupt, or oppressive manner; if otherwise, this court will interfere—Tapp. on Mand. 12-14, & notes; Rex v. Justices of Wiltshire, 10 East, 404; Rex v. Archbishop of Canterbury, 15 East, 136; State ex rel. Epler v. Lewis, 10 Ohio, 128; Gulich v. New, 14 Ind. 93; Marion et al. v. McCall, 5 Geo. 522. For a full elaboration of this point, see People ex rel. &c. v. Superior Court of N. Y., 5 Wend. 114; Pickett's case, 1 Spencer (N. J.) 134; Platte Co. Ct. v. McFarland, 12 Mo. 166.

*Green and Ryland*, for respondents.

It is within the province of a superior court to compel an inferior court to act ; but where they have acted upon a matter in which they have a discretion legally submitted to them, their decision, however erroneous, cannot be reviewed on writ of mandamus. And the judgment of no other tribunal can be substituted for theirs—19 Pick. 298 ; 21 Pick. 259 ; 10 Pick. 244.

WAGNER, Judge, delivered the opinion of the court.

This case comes before us on a demurrer to the petition, and the only question is whether this court has jurisdiction over the proceeding. The relator avers his title to the office of sheriff of Lafayette county, and that he was duly elected, commissioned and qualified, and has acted as such up to the 6th day of June, 1867, when the respondents acting in the capacity as judges of the County Court in said county made an order, which was entered of record in said court, declaring the office of sheriff vacant.

It is further alleged that on the 24th day of May, 1867, the County Court of Lafayette county caused an order to be made stating that the revenue of the county for the year 1867 would be about \$85,000, and requiring the relator as sheriff to make a bond with sufficient security in double that sum within ten days from the date thereof ; that on the 3d day of June, 1867, within the time specified, he appeared before the said court, then in open session, and produced, exhibited and offered for approval his bond as collector of the revenue, with good and sufficient sureties, in the penal sum of one hundred and seventy thousand dollars and conditioned as required by law ; that anticipating unfair and unjust action on the part of the said court, the justices whereof are personally and politically hostile to the relator, he took extraordinary pains in procuring sureties, and that thirty-five well known and responsible citizens of Lafayette county, who are owners of real estate situated therein, became his

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sureties in said bond and as such executed the same, he having first executed it as principal ; that the said sureties are owners of real estate in said county of the value of at least three hundred thousand dollars, subject to execution, over and above their debts and liabilities, and that this fact was and is well known to the justices of said County Court ; but that, notwithstanding the premises, the said County Court actuated by malice and by a determination to deprive him of his said office, through a corrupt, arbitrary and illegal use of the forms of law, rejected and refused to accept said bond, and also refused to allow the relator to prove the sufficiency and responsibility of his sureties.

The petitioner further states, that on the 6th day of June, 1867, the said County Court, in order to carry out its malicious, arbitrary, corrupt and illegal intention and determination, made and adopted an order declaring the office of sheriff of said county vacant on account of the failure of the petitioner to execute his bond as collector, and ordered a new election ; and a mandamus is prayed for to command and require the County Court to accept and approve the said bond, &c.

The respondents demur to the petition on the ground that the County Court has a discretion by law in refusing or approving bonds ; that the subject-matter belongs to its exclusive jurisdiction, and that having acted, this court cannot revise its action or take cognizance of its proceedings through the process of mandamus.

The writ of mandamus lies either to compel the performance of ministerial acts, or is addressed to subordinate judicial tribunals, requiring them to proceed to exercise their judicial functions, and give judgments in cases before them. Mandamus will not lie to compel an inferior tribunal to give a particular judgment, or to reverse its decision where it has once acted ; its peculiar scope and province being to prevent a failure of justice from delay or refusal to act. Where the subordinate tribunal acts judicially, it may be compelled to proceed, but it will be left to decide and act according to

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its best judgment. In such cases the party aggrieved by the decision has his remedy either by appeal or writ of error, and mandamus never issues except where the petitioner has a specific right and no other specific remedy.

The existence of an equitable remedy, such as specific performance, constitutes no impediment to the remedy of mandamus (*People v. Brennan*, 39 Barb. 522; 10 Wend. 395); nor will it be denied merely because the relator may have a remedy by action for damages—*People ex rel. Livingston v. Taylor*, 1 Abb. Pr. (N. S.) 200; S. C. 30 How. Pr. 78. It is sufficient if the relator has no other remedy for the specific right which he claims. Thus, it has been determined in New York that the commissioner of jurors is not a judicial but a ministerial officer within the rule. The act of the commissioner of jurors in determining upon the sufficiency of the excuse relied on by such an applicant, is not a judicial act within the rule relating to mandamus. It is true, he has to decide on the sufficiency of the excuse offered by the juror to have his name stricken from the list of jurors; but still the nature of that excuse and the duty of the officer are clearly defined by the statute; and when the truth of the facts relied on is shown to him, he has no discretion to exercise, and has no right to keep the name of the juror on the list—*People v. Taylor*, *supra*.

In *Dunklin Co. v. District Ct.*, 23 Mo. 449, the court said that the writ issued “in order to prevent disorder from a failure of justice or defect of police, and is therefore granted only in cases where the law has provided no specific remedy, and in justice and good government there ought to be one. It does not lie to correct the errors of inferior tribunals by annulling what they have done erroneously, nor to guide their discretion, nor to restrain them from exercising power not delegated to them; but it is emphatically a writ requiring the tribunal or person to whom it is directed, to do some particular act appertaining to their public duty, and which the prosecutor has a legal right to have done.”

Now, is the approval or rejection of a sheriff's bond by the

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County Court the exercise of such judicial function or discretion as will preclude this court from all supervisory control of its action? The G. S. § 2, p. 113, provides that the sheriff shall give bond and security to the State, to the satisfaction of the County Court. The only duty of the court is to be satisfied that the bond and security is sufficient. There is nothing presented before the tribunal for adjudication, and its action is not the exercise of a judicial discretion or judgment within the meaning of the rule. The approval or rejection of the bond is essentially a ministerial act, though coupled with a discretion. When the law devolves upon an officer the exercise of a discretion, it is a sound legal discretion, not a capricious, arbitrary, or oppressive one. In a case like the one presented here, if this court has no jurisdiction the petitioner would stand in the anomalous attitude of a person having a clear specific right, and yet be entirely remediless by law. A hostile court could remove any sheriff in the State and vacate his office by declaring his bond insufficient, and arbitrarily refusing to hear any testimony in regard to the solvency and pecuniary responsibility of his sureties. If the County Court acts independent of all supervision, and its discretion is exclusive and uncontrollable, the result above indicated may follow, and there is no redress. It is true that the judges may be punished for malfeasance in office, but that furnishes no remedy to the person unjustly deprived of his rights. A discretion delegated to an officer is a sound legal discretion, the meaning of which is well known and understood in the law, and is not an unlimited licence to the officer to act and do as he pleases, irrespective of restraint. The universal practice has been, and it is doubtlessly the most satisfactory way of proceeding in determining the sufficiency of a bond, to examine the parties to the bond who have signed it touching their responsibility, and also other witnesses who are conversant with their means, in open court, and we are at a loss to know why this privilege was denied the relator in this case. He had the right to introduce evidence concerning the

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sufficiency of the bond, and it was the duty of the court to hear the same. Section 3, article 4, of the State Constitution invests this court with the power of issuing mandamus and other remedial writs, and declares that it shall have a general superintending control over all inferior courts of law. The citizen has the undoubted right to appeal to this remedial process in a proper case, when he would be otherwise without remedy; and here if we have no authority to interfere, the action of the County Court would be final, for neither appeal or writ of error will lie in this instance.

Our opinion is that the demurrer should be overruled. The other judges concur.



STATE OF MISSOURI *ex rel.* R. F. WINGATE, Attorney-General,  
Petitioner, *v.* WARREN WOODSON, Respondent.

1. *Constitution—Office—Qualifications.*—The power of the State to declare in its Constitution, or, when that is silent, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as the power to fix the qualifications of voters. (*Ante Blair v. Ridgely et al.*, 63.)
2. *Constitution—Jurisdiction—Circuit Courts—Elections—Office.*—The power granted to the Circuit Courts to relieve parties from disabilities imposed by art. 2 of the Constitution confers a special and limited jurisdiction, and the record of, the proceedings must therefore show all the facts which give the jurisdiction: and if this be not done, the judgment of the court will be void. The record must show that the applicant is a resident of the county; that after committing the acts of disloyalty he voluntarily entered the service of the United States, and was duly sworn and mustered into service under regular military authority; that he was honorably discharged, and that after his discharge he demeaned himself as a faithful and loyal citizen. Forces organized for home protection were not forces in the service of the United States. HOLMES, J., dissenting upon the latter point, citing *ante Drehman v. Stifel*, p. 184; and holding, also, that the word "sympathy," in art. 2, § 3, of the Constitution, had a peculiar meaning arising out of the history of affairs in this State, and that by it was meant not the feeling of kindness or affection for some individuals engaged in rebellion, but a sympathy with the cause of the rebellion manifested by acts which would be of a treasonable character.

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*Information in the nature of Quo Warranto.*

Attorney-General Wingate, and A. F. Denny, for State.

I. No person who has done any of the acts specified in § 3, art. 2, State Constitution, is entitled to hold any office of honor, or trust, or profit—*Vide* latter part of § 3, art. 2, Const.

II. The decree of the Circuit Court relieving the defendant from the disability is void. The proceedings being summary and *ex parte* under a special provision of the Constitution prescribing the course to be pursued, that course must be strictly followed, otherwise the proceedings are void—Morton v. Reed, 6 Mo. 73; Crooks v. Thurston, 8 Mo. 344; Ruby v. Huntsman, 32 Mo. 501; Thatcher v. Powell, 6 Wheat. 119; Young v. Morain, 11 Ills. 636; Wallace v. Vigas, 4 Blkfd. 260; The People v. Woodbury, 14 Cal. 43; *In re* Underwood, 3 Cow. 59; Bloom v. Burdick, 1 Hill, 139; Atkins v. Kinnon, 20 Wend. 249; *Ex parte* Simmon-ton, 9 Porter, 396-7; Wyman v. Mitchell, 1 Cow. 316; Black. on Tax Titles, 2d ed., 184; 2 Phill. on Ev. (Cow. & Hill's Notes), 137-48; Clapp v. Beardsley, 1 Aiken, 168.

III. The record of the Boone Circuit Court does not show that defendant was a resident of Boone county—§ 23, art. 2, State Const.

IV. The record of the proceedings of the Boone Circuit Court does not show that defendant voluntarily entered the military service of the United States—sec. 23, art. 2, State Const.; 19 Johns. 7.

V. The defendant being ineligible, the votes cast for him were nullities; and the party receiving the next highest vote, if eligible, is entitled to the office—§ 3, art. 2, Const.; § 8, art. 2, Const.; Cush. Law & Prac. Leg. Assem. 66; Gulick v. New, 14 Ind. 93; State v. Johnson, 17 Ark. 407; Patterson v. Miller, 2 Ky. (Metc.) 493; The People v. Vail, 20 Wend. 12.

Wm. A. Hall, for defendant.

FAGG, Judge, delivered the opinion of the court.

The questions for consideration in this case arise upon a demurrer to the answer of the defendant.

The information in the nature of a *quo warranto*, filed by the Attorney-General against the defendant, alleges that at a general election held in the county of Boone on the 6th day of November, 1866, one Henry N. Cook was duly elected clerk of the County Court of said county, he having received the highest number of legal votes cast for any one person for that office, and for whom the same could be legally counted; that the defendant on or about the 8th day of January, 1867, did usurp and intrude into said office, and has since that time unlawfully and wrongfully held the same, having no legal authority or commission therefor. It is admitted that the defendant was voted for at said election for that office; but it is charged that by reason of his disloyalty to the Government of the United States, and by failing to take and subscribe the oath of loyalty required by the Constitution of the State, he was ineligible thereto. The answer admits that defendant did take possession of the office, but denies that his act was wrongful and without authority; on the contrary, it alleges that he was duly elected and commissioned as required by law. It is admitted that the defendant sympathized with persons in armed hostility to the Government of the United States, but it is alleged that he was subsequently relieved from that disqualification by a decree of the Circuit Court of Boone county. A copy of the petition and proceedings of the court are attached to and made part of the answer.

It is also averred that, within the time prescribed by law, he took and subscribed the oath required to be taken by candidates for office, except so much as refers to the 3d section of the 2d article of the Constitution. The answer also contains a statement of the facts upon which the defendant claimed to be relieved by the Circuit Court, and upon which the jurisdiction of that tribunal in the premises rested. It

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concludes by denying that defendant was bound to take the oath, except in the form in which he did take it, and avers that "all that part of the oath of loyalty referring to the past acts and conduct of the defendant is contrary to the Constitution of the United States and void in this: that it is an *ex post facto* law and a bill of attainder.

The qualifications necessary to hold office are, so far as the question of loyalty is concerned, identical with those prescribed for voters. The same oath is required to be taken in both cases. In the case of *Blair v. Ridgely*, the question as to whether this provision of the State Constitution is in conflict with the Constitution of the United States was fully considered and determined by this court at its last March term in St. Louis. It will not be necessary therefore to discuss it now, or to restate the reason upon which the decision in that case rests.

The power of the State to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as is the power to fix the qualifications of voters; that point, therefore, may be disposed of by a simple reference to the case just cited. The only remaining point for consideration is the validity of the decree of the Circuit Court by which the defendant claims to have been relieved from a disqualification which his own petition to that court admitted to exist. The Constitution of the State has in cases of this sort conferred upon the Circuit Courts a peculiar and extraordinary jurisdiction. The grounds upon which it is made to depend as well as the manner of proceeding are set out with great minuteness in the Constitution. All of the authorities seem to agree substantially that in such cases the provisions of the law must be strictly followed, or else the action of the court should be held to be illegal and void. The case of *Thatcher v. Powell*, 6 Wheat. 119, may be regarded as the leading case upon that point, and one that has been uniformly followed by the State courts. Ch. Justice Marshall, in delivering the opinion of

the court, says: "In summary proceedings when a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear in order to show that its proceedings are *coram judice*. Morton v. Reed, 6 Mo. 64; Crook et al. v. Peebly, 8 Mo. 344; Young et al. v. Lorain et al., 11 Ills. 624; Dentler v. State, 4 Blkfd. 258, and Bloom v. Burdick, 1 Hill, 130, may also be referred to as expressly recognizing the same doctrine. The record and proceedings of the Circuit Court, as shown by an attested copy of the same attached to the defendant's answer, fails, as we think, to exhibit the facts necessary to warrant the decree. Following the authorities upon this point, nothing ought to be left to implication or inference. If the necessary facts are not stated in a proceeding of that sort, the court must conclude that they do not exist. It would seem to be required of the applicant to show affirmatively that he was a resident of the county in which his application is made. From the very nature of the case this appears to be a reasonable requirement, imposing no hardship upon the petitioner, and affording an opportunity to persons familiar with his character and deportment to controvert the facts upon which his application may be based. It is, however, not requisite that this requirement should be supported by argument; it is enough to say it is so written, and must be followed. Passing by this point however, and assuming for the sake of the argument that the application and proceedings of the court were in all other respects right and proper, the fact most important of all, and the one absolutely necessary to support the jurisdiction of the court, is not stated. 1st. It should have been sufficiently averred that the petitioner, after the commission of the act of disloyalty, had voluntarily entered the military service of the United States; 2d. That he had been honorably discharged therefrom; 3d. That since his discharge he has demeaned himself in all respects as a loyal and faithful citizen.

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The petition, after stating the acts of disloyalty committed by the defendant, proceeds as follows: "That sometime in the summer or fall of 1864 he voluntarily entered the *service of the country* in a company commanded by Capt. James S. Rollins, who was in actual service under the immediate command of Capt. Cary, who was in the United States voluntary service." Such an averment totally fails to meet the requirements of the law. This failure is not cured by a positive averment in any other part of the petition, that the defendant had ever voluntarily entered the military service of the United States. There can be no misunderstanding about the meaning of these words. They exclude the idea of any other kind of service except that performed by a military force regularly sworn and mustered into the service of the United States. The public history of the times justifies us in taking judicial notice of the fact that there were many organizations of the character stated in the defendant's petition—most of them, perhaps, authorized and equipped by officers of the United States. Still it cannot be pretended that forces thus raised for local protection against guerrillas and outlaws, even though they may have incidentally assisted the Government in carrying on its military operations, were in any just sense United States soldiers. This, we apprehend, is the test which the Constitution intends shall be applied to every one seeking to avail himself of the benefits of its provisions. We, of course, have nothing to do with the policy which may have dictated such a requirement in the Constitution. It is the province of the court simply to see that the law is properly interpreted and executed. That can only be said to be done, in cases like this, when its plain and unmistakable provisions are strictly complied with. We conclude, therefore, that there was no sufficient averment of the fact so essentially necessary to support the jurisdiction of the court, and its decree cannot be held to be legal and valid.

The defendant's answer does not contain a statement of facts sufficient to establish his claim to the office in question, and the demurrer must be sustained.

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It follows that the defendant Warren Woodson is guilty of usurping and intruding into the office of clerk of the County Court of Boone county, and we accordingly adjudge that he be ousted therefrom. It is further ordered that he pay the costs of this proceeding. Judge Wagner concurs.

HOLMES, Judge, delivered the following dissenting opinion.

This case is submitted upon demurrer to the answer. It is assigned for a cause of demurrer that the record of the proceedings and decree of the Circuit Court of the county of Boone, relieving the defendant from his disqualification, do not show that he had ever committed any of the acts specified in the third section of the second article of the Constitution; nor that the proceedings were had in the county of the defendant's residence; nor that he had ever voluntarily entered the military service of the United States, and been honorably discharged; and further, that he had not taken the oath of loyalty as required by the Constitution, and was therefore ineligible to the office.

First, it may be observed, that the petition for relief was somewhat inartificially drawn, and is objectionably indefinite in the forms of expression. It is for this reason not a little difficult to decide upon its sufficiency.

The cause of disqualification was stated to be "that he had a son and some relatives in the so-called Confederate Government who were in armed rebellion against the lawful authorities of the Government of the United States, and sympathized with his son and relatives whilst thus engaged." In the third section referred to, the words "or has ever by any word or deed manifested his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States," are introduced in immediate connection with the preceding clauses which specify acts that would clearly amount to treason, and these words, as well by their own import as upon the principle of *noscitur a sociis*, would seem to imply some

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conduct of a treasonable character. The word *sympathy* was evidently not used here in its most general sense: it means something more than mere feeling. It is well known that during the late civil war, there was a class of adherents to the rebel cause within this State, who were not openly in arms, but secretly co-operated with the enemy in various ways, giving aid and comfort upon occasion, and who in common parlance came to be called *sympathizers*. The word thus came to have a peculiar meaning in this State, and as such found its way into the Constitution. The word "bushwhacker" is another example of these local terms having a new and peculiar signification in common speech. *Sympathy with those engaged in exciting or carrying on rebellion*, as the words are here used, must therefore, I think, be understood to import some conduct of a treasonable nature; and it may fairly be inferred that the petitioner, when he alleged that he had *sympathized* with his son and relatives whilst engaged in armed rebellion against the United States, meant to be understood as using the word in the sense of the Constitution, and as implying treasonable conduct on his part, and not merely a feeling of sympathy for their sufferings or of interest in their welfare. At any rate, the petitioner evidently intended to admit and state that he had done an act which came within the meaning of this third section, and I think he may be taken at his word. It is not averred in terms that the petitioner was a resident of the county of Boone. The Constitution required that he should "in person present his petition to the Circuit Court of the county of his residence"—Art. 2, § 23. I find it stated that "he and a large number of citizens proposed the voluntary organization of a military company of the citizens of Columbia for the purpose of putting down guerrillas," and "did voluntarily organize themselves into a company," &c. We may take judicial notice that the town of Columbia is in the county of Boone, and by a liberal construction this language may be said to import that he and the other members of the company were resident citizens of that town. The provision

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seems to refer more especially to the court which is to have jurisdiction in these cases, and not particularly to the facts which were to constitute the foundation of the jurisdiction. No particular stress appears to be laid on the circumstance of residence in reference to the right of the petitioner to have relief. I see no other reason why the proceeding should necessarily be had in the county of his residence than that the enactment provides that it may be had in that county, and has not expressly said that it may be had in any other county. It may look to the convenience of the party himself, since it may be supposed that his evidence would be more easily produced in the county of his residence. It is purely an *ex parte* proceeding. No adversary party is contemplated and no notice is required to be given to any other person; not even to the circuit attorney as representing the county or the State. The whole matter is to be submitted to the court on the petition and the proofs adduced by the party himself. I am inclined to think it sufficiently appears by the record that the proceeding was had in the county of the defendant's residence.

The other objection on which the greater stress is laid respects the averment of military service. The Constitution required only that he should "have voluntarily entered the military service of the United States—Art. 2, § 28. The allegations were that "in 1864 he voluntarily entered the service of the country in a company commanded by Capt. J. S. Rollins, who was in actual service under Capt. Cary, who was in the United States voluntary service, and served and performed all the duties required of him as a soldier in the service of the United States until he was honorably discharged from service as aforesaid"; and further, that "in the spring of 1865 he was a member of a voluntary organization of a military company of the citizens of Columbia for the purpose of putting down guerrillas in the name of the United States and in pursuance of orders made by the commanders of United States forces in the Department of Missouri and under the command of Capt. N. J.

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Harbison, which was armed and equipped by procuring arms and ammunition from the United States arsenal, and was mustered and held ready to march at the call of the department commander; and that he belonged unto said organization until after the guerrillas and regular Confederate forces had surrendered to the army of the United States; and that he had during his said terms of service, and ever since, demeaned himself as a faithful and loyal subject of the Government of the United States."

There is some lack of precision in the form of these statements, but, giving them a fair interpretation, I do not well see how they can be held to amount to anything less than a substantial averment that he had voluntarily entered the military service of the United States and been honorably discharged. The facts so stated must be taken as true so far as this objection is concerned. No particular branch or kind of service is specified in this enactment. It is not necessarily to be service in the regular army, nor a formal enlistment for any given period of service in the volunteer forces. The kind of service, or the time of service, or the manner of enlistment, is not the material thing. It was evidently contemplated by the Constitution that as the disqualification was to arise from some act of treason, or disaffection, the removal of the disqualification when once incurred should be made to depend upon the simple fact that the party had since voluntarily entered the military service in the cause of the Union. This fact alone, when proved to the satisfaction of the court having jurisdiction, is assumed by the law to be enough to show that the party had returned to his allegiance, and was again ready and willing to perform all the duties of a loyal citizen. The Constitution was framed before the war ended, and it may reasonably be inferred that one object of this provision was to furnish an inducement to such persons to abandon the rebellion and adhere to the cause of the Union. It may be supposed that another object was to obviate the manifest injustice that would be done to meritorious soldiers who had voluntarily served in the ar-

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mies of the country, though they had been previously implicated in the rebellion, and had thus given evidence of their return to loyalty and duty, by subjecting them to a deprivation of the common rights and privileges of citizenship.

The allegations necessarily import that he was a volunteer in the military service of the United States, in a company that was raised, armed, equipped, and commanded under the authority of the Government, and that the company was a part of the United States forces, and was employed in military operations against the public enemy. I do not see but that a volunteer service in such a force may afford satisfactory evidence that the party had returned to his allegiance and become a loyal citizen; though if he had enlisted in the regular army, or in some corps organized for a longer term of service, his conduct might have been still more creditable.

In the case of *Drehman v. Stifel*, March term, 1867, (*ante* p. 184,) this court held that volunteer regiments of Home Guards, called into service by authority of the United States, armed and equipped from the arsenal at St. Louis, and acting under the orders of the commander at that post, were a lawfully military force engaged in the military service of the United States.

These considerations, I think, sufficiently show that the military service alleged was such as to answer the strictest terms of the law, and that it came within the spirit and policy of this special enactment.

The court was acting under a special jurisdiction. The judgment is not conclusive of the jurisdiction; the record may be looked into for the facts which confer the power and show that it was lawfully exercised; and every requisite that was essential to give jurisdiction must appear upon the face of the record, or the judgment will be regarded as a nullity. —*Grignon v. Astor*, 2 How. (U. S.) 341; *Patterson v. Fagan*, 38 Mo. 81. Where the statute gave power to order a sale only upon the report of the sheriff on certain publications being made, it was held that the report gave the jurisdiction, and that without it the matter was *coram non judice*,

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and the court was powerless—*Thatcher v. Powell*, 6 Wheat. 119. In this case it cannot be said that the necessary facts were wholly wanting. The essential facts were that the petitioner had done some one of the acts specified in this third section, and that he had subsequently volunteered in the military service of the United States and served until honorably discharged. I think that these facts sufficiently appear on the face of the record; that they were enough to show that the proceeding was *coram judice*, and that the court had power and jurisdiction over the subject-matter and over the person. This being so, the decree was conclusive upon the merits of the case.

On the whole, my conclusion is that the defendant was relieved from his disqualification; that the oath which he took was all that was required of him by the 24th section of the 2d article of the Constitution, and that he was lawfully entitled to hold the office.

Such being my view of the matter, the question of the constitutionality of the oath of loyalty is not essential to the determination of the case, and I see no useful purpose to be answered by my entering upon the consideration of that subject. Whenever that question shall again come directly in judgment I shall be ready to re-examine it with freedom and candor, and upon the best lights which may be then before me. For these reasons I dissent from the opinion of the majority of the court.



STATE OF MISSOURI *ex rel.* R. F. WINGATE, Attorney-General,  
Petitioner, *v.* JOHN S. MORRISON, Respondent.

*Constitution—Executive—Commission—Officer—Sheriff.*—Before a person elected to the office can assume the duties of sheriff he must be commissioned by the Governor. See *ante* State ex rel. Att'y-Gen'l v. Pool, 32.

*R. F. Wingate*, Att'y-Gen'l, *A. F. Denny*, and *Robert Prewitt*, for State.

The defendant is required to have a commission issued by

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the Governor before he is authorized to exercise the duties of sheriff—§ 25, art 5, Const. ; § 25 G. S. 63 ; § 1 G. S. 56 ; § 1 G. S. 38 ; Brodie v. Campbell, 17 Cal. 12.

*Wm. A. Hall*, for defendant.

Authorities: 8 Mo. 264 ; 10 Pet. 472 ; 6 Pet. 729-30 ; 15 Mo. 141 ; 16 Ohio, 463 ; 5 Cranch, 185 ; 10 Wheat. 192 ; 6 Cranch, 267.

HOLMES, Judge, delivered the opinion of the court.

This is an *ex officio* information in the nature of *quo warranto*, alleging that the respondent had on the 9th day of November, 1866, intruded into and usurped the office of sheriff of the county of Howard, and had since that day unlawfully held said office, exercising the duties thereof without having a commission from the Governor.

There were some other allegations to the effect that the respondent was disqualified under the Constitution of the State from holding said office.

The answer of the respondent alleged that he had been duly elected sheriff of said county at the general election which was held on the 6th day of November, 1866 ; had received his certificate of election, had filed his bonds both as sheriff and collector, had taken and filed the oath of loyalty as required by the Constitution, and had been duly qualified and had entered upon the duties of the office ; but admitted that he had not been commissioned by the Governor as such sheriff.

Some other matters were stated also in denial of the causes of disqualification which were averred in the petition.

The cause was submitted upon a demurrer to the answer.

It has already been decided by this court that the sheriff is one of the officers who are by the Constitution required to be commissioned by the Governor—State ex rel. Att'y-Gen'l v. Pool, *ante* p. 32. We see no occasion for any further discussion of this question. The respondent could not law-

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State ex rel. Dyer v. Auditor.

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fully enter upon the duties of the office until he had received a commission.

This necessarily disposes of the whole case; and the other matters which appear in the pleadings need not be considered at this time. They involve an issue of fact which is not essential to the final determination of the case upon this record. It follows that the exercise of official functions by the respondent as sheriff without a commission from the Governor is unlawful, and in effect a usurpation of the office.

The demurrer must therefore be sustained; and a judgment of ouster and costs will be entered. No fine will be imposed. The other judges concur.

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STATE OF MISSOURI *ex rel.* DAVID P. DYER, Secretary of the State Senate, Petitioner, *v.* ALONZO THOMPSON, State Auditor, Respondent.

*General Assembly—Journals—Printing—Revenue.*—By the provisions of the statutes (G. S. ch. 7 & 20), the reports and documents presented to either house of the General Assembly constitute part of the journals required to be kept by the secretary and clerk, and are required to be printed as an appendix to the journals. The secretary of the Senate is therefore entitled to be paid for copies of such reports and documents furnished to the public printer, to be bound up with the reports of the daily proceedings.

*Petition for Mandamus.*

WAGNER, Judge, delivered the opinion of the court.

The relator alleges in his petition that on the — day of January, 1867, he was elected secretary of the Missouri State Senate; that after such election he took the oath of office and entered upon the discharge of the duties of the office, and so continued until the 14th day of March, 1867, at which time the regular session of the 24th General Assembly adjourned; that by the laws of the State it was made his duty as such secretary to keep a journal of the proceedings at the Senate, and to cause a copy thereof to be furnished to the

public printer for the press ; that the same had been furnished, and that the public printer has printed the same from the copy so made out and delivered to him by the relator. It is further averred that the relator made out his account for copying the said journal and duly presented the same to the State Auditor for allowance, but that the Auditor refused to draw his warrant for copying that part of the journal which included the appendix. The answer of the Auditor admits the correctness of the account, but states that, in view of the action of the Legislature at its late session, he does not feel justified in auditing that portion of the account of the relator wherein he claims for the matter contained in the appendix.

The only question raised for the determination of the court, is, whether the appendix which the law authorizes and requires to be printed and bound with the journal, constitutes a part of the journal proper, so as to entitle the secretary to receive the same pay for making it out as the law allows for copying the daily proceedings of the Senate.

Section 17, ch. 7, of the General Laws makes it the duty of the Senate and House of Representatives to cause the journals of their respective houses to be copied and prepared for press, without delay. Section 20 of the same chapter prescribes the amount which shall be allowed by the secretary and the clerk of the respective houses for copying the journals for the press, and requires the State Auditor to audit and adjust the accounts when presented for such services.

Section 21 of ch. 20 provides that the journals of each house shall be bound in a certain manner, and explicitly declares that the reports and public documents shall be contained within the journals under the head of appendix ; and by section 28 the duty is devolved on the secretary of the Senate and clerk of the House of Representatives to furnish to the public printer, every day during the session of the General Assembly, a copy of the journal of their respective houses for the day preceding, till the whole journal shall be copied and delivered.

These last two sections must be construed together. Sec. 28 does not undertake to define what shall constitute the journal, but merely prescribes the daily duties of the secretary and clerk in transcribing and furnishing the proceedings of each house while in session. But section 21 states without ambiguity, and with unquestioned clearness, that reports and public documents shall be contained within the journal, under the head of appendix. The appendix then must be taken to be a part of the journal. The law contemplates that the secretary and clerk shall furnish the printer the reports and public documents which make up the appendix, and are included in and form a part of the journal, in the same manner as they do the daily proceedings of the Legislature; and when they perform that duty, they are entitled to pay for all alike.

It stands admitted on the record that the work was done by the petitioner, and a peremptory mandamus must therefore be ordered. Judge Holmes concurs; Judge Fagg not sitting.

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JOHN W. SCRUGGS, Plaintiff in Error, v. JAMES SCRUGGS and  
NAPOLEON B. SCRUGGS, Defendants in Error.

1. *Conveyances—Sheriff's Deed—Acknowledgment.*—Where the entry of the acknowledgment endorsed upon the deed executed by the sheriff is regular and in proper form, the error of the clerk in making his entry of record will not invalidate or affect the deed. The law imposes a duty of making the statutory entries on the clerk as the officer of the court, but over him the purchaser has no control.
2. *Limitations—Adverse Possession.*—An actual, continued, adverse and open possession of the premises sued for, with an assertion of title for more than ten years prior to the commencement of an action of ejectment, bars the plaintiff's title.

*Error to First District Court.*

The clerk's entry on the record was as follows:

"W. D. Kerr, sheriff of Cole county, this day comes into court and acknowledges the execution of a deed of convey-

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Scruggs v. Scruggs et al.

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ance, conveying from him as sheriff to James Mahan the west half," &c.

The certificate of acknowledgment endorsed on the deed from the sheriff to Mahan was as follows :

"State of Missouri, County of Cole.—Be it remembered, that on the 25th day of May, A. D. 1847, personally appeared the above-mentioned W. D. Kerr before the Circuit Court in and for the county of Cole, and in open court acknowledged the above and foregoing instrument of writing, as sheriff of said county, to be his act and deed for the purposes therein contained and mentioned ; he, the said Kerr, being personally known to said court as sheriff of said county, and the person whose name is subscribed to the above and foregoing instrument of writing, as having executed the same. In testimony," &c.—G. A. Parsons, clerk, by Rob't Kyle, D. C. (Seal.)"

*Ewing & Smith*, for plaintiff in error.

I. This is a valid and sufficient certificate of acknowledgment in all respects—R. C. 1845, p. 485, § 50 ; id. p. 222, § 21 ; *Allen v. King*, 35 Mo. 216 ; *Crowley v. Wallace*, 12 Mo. 143.

II. Possession to be of any avail under the statute of limitations must be adverse and hostile to the claim or claims of all the world—32 Mo. 558 ; 34 Mo. 44 ; 22 Mo. 267 ; 28 Mo. 483 ; Ang. on. Lim. 478 et seq. & 444.

*Geo. T. White*, for defendants in error.

As plaintiff's vendor never had possession of the land, but it was proved to have been always in the possession of defendants, there can be no pretence that he should have any sort of right to recover under his deed of purchase—*Gray v. Givens*, 23 Mo. 291-300 ; *Carter v. Scaggs*, 38 Mo. 302 ; *Shafer v. Shoot*, 25 Mo. 203-4 ; *Gay v. Moffit*, 2 Bibb, 506 ; *Carondelet v. Simon et als.*, 37 Mo. 408 ; *Cottle v. Sydnor*, 10 Mo. 769 ; *Menkens v. Ovenhaus*, 22 Mo. 75 & 266 ;

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Bollinger v. Chouteau, 20 Mo. 94; Layson v. Galloway, 4 Bibb, 100; 5 Serg. & R. 236; Biddle v. Mellon, 13 Mo. 335.

WAGNER, Judge, delivered the opinion of the court.

Ejectment brought by plaintiff for a tract of land in Cole county. The defence set up and relied on was the statute of limitations. On the trial in the Circuit Court the jury found for defendants, and judgment was rendered accordingly. The case was then taken to the District Court, where the judgment was affirmed, and from that decision the plaintiff prosecutes his writ of error.

At the trial in the Circuit Court, the plaintiff, for the purpose of deducing title, offered and read in evidence a deed made by the sheriff of Cole county to one Mahan, who afterwards conveyed all the title which he acquired to the premises by virtue of the said sheriff's deed to plaintiff. This deed was subsequently excluded from the consideration of the jury by an instruction of the court, and this action of the court in giving the instruction (which is numbered ten in the defendants' series) is the principal error complained of by the plaintiff. The reason assigned for the exclusion of the deed is based on an assumed insufficiency of the certificate of acknowledgment, and in this connection the point is raised that the clerk of the court failed to make the proper statutory entry on the record at the time of making the acknowledgment by the sheriff, and that this failure or clerical error constitutes a fatal defect. Sec. 50, R. C. 1845 (which governs this action), under the title of Execution, provides that every officer executing any deed for lands, tenements, or hereditaments, sold under execution, shall acknowledge the same before the Circuit Court of the county in which the estate is situated. Section 51 declares that the clerk of the court shall endorse upon such deed a certificate of the acknowledgment or proof under the seal of the court, and shall make entry of such acknowledgment or proof, with the names of the parties to the suit and a description of the property conveyed.

The certificate of acknowledgment endorsed on the deed states that the sheriff personally appeared before the Circuit Court in and for Cole county, in open court, and acknowledged the deed, as sheriff of said county, to be his act and deed for the purposes therein contained and mentioned; and that the sheriff was personally known to the court as the sheriff of said county of Cole, and the person whose name was subscribed to the instrument as having executed the same. The certificate of the clerk endorsed on the deed states and embodies every essential fact required by the statute, and is in substantial compliance with the law.

The entry made by the clerk on the record is defective: it merely says that the sheriff came into open court and acknowledged the execution of a deed of conveyance, conveying from him as sheriff to James Mahan certain property, describing it; whereas the statute requires that in addition to the above facts the names of the parties to the suit should be stated. But will this clerical omission or error operate to the prejudice of the purchaser? It is undoubtedly the duty of a party taking a deed as grantee, or vendee, to see that his conveyance is correct, and that it contains apt words carrying the interest intended to be conveyed, and that the acknowledgment is in due form of law. But a mistake of the clerk in making up the records of the court ought not to be allowed to affect the purchaser injuriously when the conveyance, acknowledgment and certificate are all regular, and convey a perfect title. The law imposes a duty of making the statutory entries on the clerk, an officer of the court, and the purchaser has no control over him. Were the record entry offered in evidence to give effect to or aid a defective acknowledgment, a different case would be presented; but such is not the fact. It is not invoked by the plaintiff: his deed, certificate and acknowledgment are all regular and constitute a valid conveyance, and it cannot be impaired by the defendants showing a clerical mistake, or omission by the clerk in making up his records. We therefore think the court erred in giving the tenth instruction.

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But although error was committed in this respect, we do not see that the plaintiff suffered injury thereby. The only contention presented by the defendants was the statute of limitations; and the instructions given by the court on the question of the statute tolling the entry, though open to some verbal criticism, were substantially correct. The jury found an actual, continued, adverse and open possession of the premises by the defendants, with an assertion of title for more than ten years prior to the bringing of the suit, and their verdict must be taken to be final and conclusive.

Judgment affirmed. The other judges concur.

[END OF JULY TERM, 1867.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
AUGUST TERM, 1867, AT ST. JOSEPH.

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STATE *ex rel.* PRIOR M. JACKSON, Plaintiff, *v.* THE COUNTY COURT OF HOWARD COUNTY, Defendants.

1. *Constitution—Officer—Commission—Elections.*—In issuing a commission under the provisions of the Constitution, the Governor is not precluded from looking beyond the certificate of election, and may determine for himself who was the person duly and legally elected to the office, and the commission when issued is presumptive evidence that the person holding it is lawfully entitled to the office.
2. *Courts—Jurisdiction—Duties, Ministerial and Judicial.*—The judges of the County Court in approving the bond of the sheriff as collector of the revenue act in a ministerial capacity, having authority only to exercise a reasonable discretion in passing upon the sufficiency of the security offered.—*Ante* State *ex rel.* Adamson *v.* Lafayette Co. Ct., p. 221.
3. *Mandamus—Supreme Court—Jurisdiction.*—The Supreme Court will not in the first instance direct a County Court to approve a bond tendered by a party claiming to hold the office of sheriff and collector of the revenue, the County Court not having officially passed upon the sufficiency of the bond; and if the alternative writ be so framed as peremptorily to require such approval, the peremptory mandamus will be refused. The alternative writ should be so framed as to require the County Court to pass upon the sufficiency of the bond.
4. *Sheriff—Officer—Bond—Revenue—Quo Warranto.*—The statute requiring the sheriff to give bond within fifteen days is directory, and does not impose a condition precedent to the party's title to the office.—State *ex rel.* Att'y Gen'l *v.* Churchill, *ante* p. 41. The County Court must accept the commis-

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State ex rel. Jackson v. Howard Co. Ct.

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sion issued by the Governor as evidence of the title to the office of sheriff in the party named ; and having refused to recognize such party as sheriff and to pass upon the sufficiency of the bond tendered by him, it has no authority subsequently to declare the office vacant and order a new election. If the party holding the commission was not legally elected, the opposing claimant can have the question tested by the proper process of *quo warranto* to oust the incumbent and to restore him to his rightful place.

*Application for Mandamus.*

Attorney-General, and A. F. Denny, for plaintiff.

I. This court is the general guardian of the public rights, and, in exercise of its authority to grant the writ, will render it, so far as it can, the suppletory means of substantial justice in every case when there is no specific legal remedy for the legal right.

The right of the court to apply this means for the attainment of such end, and prevent that defeat of legal justice which might otherwise ensue, has been generally admitted—Tapp. on Mand. 95 et seq., and authorities cited ; Cin. W. & L. R.R. Co. v. Comm'rs Clinton Co., 1 Ohio, 77.

In this case there is no specific remedy for the wrong complained of other than the writ of mandamus ; an appeal from the orders of the County Court in the premises would not lie.—Hixon case, *ante* p. 210 ; State ex rel. Adamson v. Lafayette Co. Ct., *ante* p. 221. No suit for damages against the individuals who compose the County Court, if such suit could be maintained, would suffice to enforce the petitioner's legal right to the office.

II. This court has the power to supervise and correct the proceedings of the County Court, notwithstanding the discretionary power confided therein, as regards the approval of the collector's bonds, provided that the power is shown to have been abused. The "discretion" spoken of must be a sound, legal discretion, and must not be used in an arbitrary, corrupt, or oppressive manner ; if otherwise, this court will interfere.—Tapp. on Mand. 12-14, and notes ; Rex v. Justices of Wiltshire, 10 East, 404, *a.* ; State ex rel. Essen v. Lewis, 10 Ohio, 128 ; Gulick v. New, 14 Ind. 93 ; Manor et

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al. v. McCall, 5 Geo. 522; People v. Superior Ct. N. Y., 5 Wend. 114; Ricketts case, 1 Spencer (N. J.) 134; Platte Co. Ct. v. McFarland, 12 Mo. 166.

III. The petitioner Jackson having been appointed sheriff under the vacating ordinance, was entitled to hold the same until his successor was duly elected, commissioned and qualified—Const. art. 5, § 22; G. S. § 1, p. 138; State v. Lusk, 18 Mo. 333; State ex rel. Robinson v. Auditor, 38 Mo. 193.

IV. The petitioner bore the commission of the Governor, which was an investiture of the office of sheriff in him, and the only question before the court was the sufficiency of the bonds presented by him. The court had no legal right to determine the eligibility of Jackson to office, nor any other collateral question, no such power being conferred upon it by the law—St. Louis Co. v. Sparks, 10 Mo. 121; State ex rel. Jackson v. Auditor, 34 Mo. 383; Winston v. Auditor, 35 Mo. 146; State ex rel. Jackson v. Auditor, 36 Mo. 70; Douglass v. Wickwire, 19 Conn. 491; State ex rel. Bartley v. Governor, 39 Mo. 388; State ex rel. Epler v. Lewis, 10 Ohio, 129.

V. The County Court, being a court of inferior jurisdiction, must not only act within the scope of its jurisdiction, but it must appear on the face of its proceedings that it so acted, or its proceedings are *coram non judice* and void—Hunt v. Hapgood, 4 Mass. 122; Alber v. Ward, 8 Mass. 86; Den v. Turner, 9 Wheat. 541; Smith v. Rice, 11 Mass. 513; Williams v. Blunt, 2 Mass. 213; Powers v. People, 4 Johns. 292; Griffith v. Frazier, 8 Cr. 9; Den v. Harnden, Paine, 55; Dennis et al. v. Jeffries, 12 Ohio, 271; Stanley v. Bank N. America, 4 Dall. 11; Hall v. Howd, 10 Conn. 520.

HOLMES, Judge, delivered the opinion of the court.

The petitioner states that he was duly elected sheriff of the county of Howard at an election held on the 6th day of November, 1866, but that the certificate of election was refused him by the County Court, and was granted to one John L. Morrison, who was ineligible to the office; that said

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State ex rel. Jackson v. Howard Co. Ct.

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Morrison entered upon the duties of the office without having received a commission from the Governor, and was ousted therefrom by the judgment of the Supreme Court at the July term, 1867, of the court; that on the 3d day of July thereafterwards the petitioner was duly commissioned as sheriff of said county, and that within fifteen days after his commission was received from the Governor he delivered to the clerk of the Circuit Court of said county good and sufficient bonds as sheriff and collector, and shortly afterwards presented his bond to the County Court for approval, and that the court refused to proceed to hear evidence as to the sufficiency of the bond and securities, and refused to regard him as the lawfully appointed sheriff, or to take any action upon his application.

It appears that the County Court declared the office of sheriff vacant, and ordered a new election, and appointed another person sheriff to fill the vacancy. The order of the court specifies the grounds and reasons of their action in the matter.

An alternative writ of mandamus was granted as prayed, commanding the County Court to approve the official bond of said Jackson as by him tendered as collector of Howard county, and to annul certain orders declaring the office of sheriff vacant, appointing another person to fill the vacancy, and ordering a new election.

The petitioner offered to produce evidence in this court as to the sufficiency of the bonds, which the court declined to hear, not deeming the question of the sufficiency of the bonds was a matter properly to be determined on this application.

The case is submitted upon the writ and return, and upon the evidence offered in support of the same. The questions of law to be decided arise upon the facts stated in the petition and admitted by the return. These questions, so far as necessary for the determination of the case as here presented, are essentially these: Whether the petitioner, by virtue of his election and commission from the Governor, was lawfully

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State ex rel. Jackson v. Howard Co. Ct.

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entitled to claim the office of sheriff, and to demand of the County Court that they should proceed to hear his application for an approval of the bonds, and should approve them if found sufficient; whether the County Court had any lawful power to declare the office vacant, to appoint another person sheriff to fill the supposed vacancy, and to order a new election for the office of sheriff; and whether this court can make the rule absolute for a peremptory mandamus in accordance with the alternative writ.

On the first question, our opinion is that the commission from the Governor was conclusive evidence for the County Court, on this application for an approval of the bonds, that the applicant was the lawfully appointed sheriff. In granting a commission under the Constitution, it must be intended that the Governor shall decide for himself, upon the evidence before him, as to the question, what person has been duly elected to the office. It has been held to be the intention of the statute on the subject, that the officer elect will produce his certificate of election before the Governor as the proper evidence of that fact; but there is nowhere anything to preclude the Governor from looking beyond the certificate of election, or from looking through the whole history of the election and determining for himself who is the person lawfully and duly elected; and the commission, when issued, must be taken as at least *prima facie* evidence that the person holding it is lawfully entitled to the office. We are of the opinion that the County Court was bound to recognize the commission, and should have proceeded to examine into the sufficiency of the bonds offered for their approval, and to approve the bonds if the sureties were found to be sufficient.

In the case of *Adamson v. The County Court of Lafayette*, decided at the last term of this court, it was held that the duties of the County Court in this respect were partly judicial and partly ministerial in their nature; that the County Court had a discretion as to the sufficiency of the bonds offered for their approval, which must be exercised in a lawful

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State ex rel. Jackson v. Howard Co. Ct.

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manner upon the facts presented ; and that this court would exercise a superintending control over that discretion so far as to compel the court to proceed according to a sound and just discretion, and to prevent the exercise of it in an unjust and arbitrary manner ; but that this court would not undertake to judge of that matter in the first instance, but would only command the court to proceed in the performance of their official duty. The alternative writ in this case is so framed as to require us to order the County Court peremptorily to approve these bonds as tendered to them. This is asking more than we have the power to do—*People v. Baker*, 35 Barb. 106.

If the alternative writ had been merely that the court should be directed to proceed and act upon the application made, and to hear the evidence offered as to the sufficiency of the bonds or the sureties, and to approve them if found to be sufficient, the peremptory mandamus would have been granted. In the form in which it is here prayed for, it must be refused.

As to the other question, we are of opinion that the County Court had no lawful authority to declare the office vacant upon the existing state of facts. The certificate of election had been granted to another person, who had filed his bonds and actually entered upon the duties of the office, though without a commission. The County Court had refused to recognize the petitioner as the person elected sheriff. It would have been useless for him to offer to give bonds. The statute supposes that the sheriff re-elected will regularly obtain his certificate of election and give his bond within fifteen days thereafter.

We do not think it can have any application to a case of this kind. Here the commission must be regarded as the evidence of election and as the appointment to the office ; and the petitioner offered his bonds within fifteen days after he received his commission. The statute in this respect must be regarded as merely directory. It was held in the case of *the State ex rel. Att'y-Gen'l v. Churchill*, (decided at the

March term, 1867—*ante* p. 41,) that the matter of filing the bonds within the time directed by the statute was directory only, and not a condition precedent to the party's title to the office, and that a failure to file the bond within the time prescribed did not forfeit his right to the office; and the action of the County Court in that case declaring the office vacant, and appointing another person to the office, we regard as having been without the authority of law and a mere nullity.

It is very probable that if the petitioner had duly received his certificate of election, and had then wholly failed to present any bonds at all, whereby the office might have become practically vacant, the court might have had jurisdiction to declare it vacant and appoint another; but nothing of this kind was done. There is no attempt to treat the office as vacant until the petitioner presents his commission and exhibits his bonds for approval, and then the court refuses to proceed or to regard him as the lawfully appointed sheriff. In this we think the court was clearly in error. It must follow that the action of the court declaring the office vacant, appointing another sheriff, and ordering a new election, was without the authority of law and void.

We think the petitioner should have been recognized as the lawful sheriff; that his bonds should have been examined, and if found sufficient should have been approved, and the petitioner allowed to enter upon the duties of the office. If there be any other person claiming the office, he has a remedy provided by law for establishing his rights, and if he could show a superior title to the office, a proceeding by *quo warranto* would oust the incumbent and restore him to his rightful place. But we are of the opinion that the County Court has no jurisdiction to sit in judgment upon such matters.

For the reason that the alternative writ (which cannot be amended) requires a larger order than it is proper for the court to grant in this case, the peremptory mandamus must be refused. The other judges concur.

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State ex rel. Hopkins v. Buchanan Co. Ct.

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STATE *ex rel.* F. G. HOPKINS, Plaintiff, *v.* JUSTICES OF BUCHANAN COUNTY COURT, Defendants.

*Criminal Practice—Costs—Execution.*—When a party indicted for a misdemeanor confesses the action and judgment is entered against him for the costs, if the defendant be unable to pay the costs, they must be paid by the county—G. S. 1865, ch. 219. A dismissal of the case at defendant's costs by an agreement of the defendant and prosecuting attorney with the assent of the court, is a confession of the action and is equivalent to a conviction. The issuing of an execution for costs by the clerk of the court is the proper method of determining the ability of the defendant to pay the costs.

*Petition for Mandamus.*

The petition was as follows :

Your petitioner, F. G. Hopkins, respectfully represents that he is clerk of the Circuit Court of Buchanan county, State of Missouri, duly elected, qualified, and acting as such, and was at the time of the rendering of the services mentioned in the fee-bill hereinafter set forth ; that at the — term of the Circuit Court within and for the county aforesaid, H. W. Smith was by the grand jury indicted for selling whiskey without a licence ; that said indictment was at said term duly returned into court endorsed "a true bill" and signed by the foreman ; that the process was ordered thereon by the court and duly issued by petitioner, and served by the sheriff ; that all of the services charged in said fee-bill were rendered by your petitioner in the discharge of his duties as clerk of said court ; that at the — term of said court, —, 18—, the circuit attorney, with and by the consent of said court and the agreement of the defendant in said indictment, dismissed the same at the costs of said defendant, and judgment was rendered accordingly ; that execution was issued thereon, but the same could not be collected ; that said defendant was wholly insolvent, and is still insolvent ; that said fee-bill was duly examined by the judge and circuit attorney of the court in which said judgment was rendered, and certified to the County Court for payment, according to the provisions of the statute in such cases

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State ex rel. Hopkins v. Buchanan Co. Ct.

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made and provided, but said County Court, consisting of defendants, refused and still refuse to allow and order the payment of the same or any part thereof; he, your petitioner, therefore prays for a mandamus against said defendants, returnable this day, requiring them to pay said fee-bill, or show cause why a peremptory mandamus compelling them to do so should not be issued.

Answer of defendants:

The plaintiff and defendants agree that the petition herein filed for a mandamus may be considered at the present term upon the following agreed state of facts:

1. It is agreed that the services were rendered as charged, but the defendants objected to paying them upon the following grounds: 1st. In this case the cause was dismissed, by the agreement of the prosecuting attorney and the defendant, without conviction or a plea of guilty. The County Court objects to pay the costs in said cause because there is neither a conviction or acquittal, but simply an arrangement between the attorney and defendant that he shall not be prosecuted if he will pay the costs.

2. If this judgment has any validity the County Court claims that it amounts only to a naked dismissal, and the costs charged by the circuit clerk for issuing execution, and all increased costs based upon the assumed validity of the judgment against the defendant, are improperly charged against the county.

*Woodson*, for plaintiff.

The plaintiff relies upon the 219th chapter of the General Laws, commencing at p. 865; also upon the case of *State v. Beard*, 31 Mo. 34.

FAGG, Judge, delivered the opinion of the court.

This is a petition for a mandamus requiring Philemon Bliss, George Schriber, and Monroe Boyer, justices of the County Court of Buchanan county to allow and order the

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State ex rel. Hopkins v. Buchanan Co. Ct.

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payment of a bill of costs, alleged to be due the petitioner as the clerk of the Circuit Court of said county, under and by virtue of the provisions of chap. 219 of General Statutes of Missouri. The case is presented here upon an agreed statement of facts, and requires but a brief consideration.

It is claimed that the liability of the county in this instance is fixed by the second section of that chapter: "The county in which the indictment is found shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them." The facts in relation to the services for which the petitioner claims that he is entitled to the fees as charged are set out in the petition, and admitted to be true by the defendants. It seems that at the — term of the Buchanan Circuit Court, one H. W. Smith was indicted by the grand jury for selling whiskey without a licence. At a subsequent term, the circuit attorney, acting under the consent of the court and by agreement with the defendant, dismissed the prosecution at defendant's cost. The costs were all regularly taxed, including a charge by the clerk for issuing an execution against the defendant, and were certified to by the judge and circuit attorney in the manner pointed out by the statute. It is claimed that the county is not liable because, 1st. There was no conviction of the defendant; and 2d. If it is bound for any portion of the costs, it ought not to be required to pay any that accrued subsequent to the order of dismissal.

The judgment for costs in every criminal case where there is a conviction necessarily follows as a part of the punishment inflicted. The conviction of the defendant is the evidence fixed by the statute for determining his liability to pay the costs of the prosecution. If the conviction is for a felony and he is unable to pay them, the costs are then paid by the State; if for a misdemeanor, by the county. What difference can it make to the county whether he is tried and convicted of the offence charged against him, or voluntarily confesses the charge to be true? In either case he would

## Peyton v. Rose.

be required by the judgment of the court to suffer the penalty imposed by law. In this case the judgment of the court entered upon his own voluntary assumption to pay the costs was sufficient to bind him for that purpose. In other words, he has by his own act fixed his liability to pay the costs, and if unable to pay them, the county is just as much bound as if his liability had been fixed by law. We can perceive no reason why the services rendered in issuing the execution were not as necessary as any others charged for. It was perhaps the most satisfactory way in which the ability of the defendant to pay costs could be determined. In any event it followed as a necessary incident to the judgment against the defendant, and should be paid as well as the remainder of the bill.

A peremptory mandamus will be issued. The other judges concur.



MISSOURI PEYTON, Plaintiff in Error, v. OLIVER C. P. ROSE,  
Defendant in Error.

1. *Practice—Trials—Evidence—Variance—Exceptions.*—Where objections are made to the admissibility of evidence on the ground of variance, objections must be taken at the trial and be preserved by bill of exceptions.
2. *Practice—Pleadings—Joinder of Actions—Error.*—Where different causes of action, although arising out of the same transaction, are united in the same count of the petition, the defect will be fatal on demurrer, motion in arrest of judgment, on writ of error or appeal, as the error appears on the face of the record.
3. *Practice—Ejectment—Equity—Fraudulent Conveyance.*—In a bill to set aside a deed as fraudulent as to creditors, the plaintiff cannot sue for the recovery of the possession of the land. A bill in equity is not the proper remedy for the recovery of the possession of real estate, as there is an adequate remedy at law. When a decree is entered setting aside the conveyance as fraudulent, the plaintiff can then sue in ejectment for the recovery of the possession. In an action for the recovery of the possession of land, the defendant is entitled to a trial by jury. In a bill to set aside a conveyance as fraudulent as against a purchaser at sheriff's sale, the purchaser is not entitled to a decree against the fraudulent grantee vesting the title in the plaintiff; for if the conveyance was fraudulent, the grantee took no title as against the creditor.

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*Error to Fifth District Court.*

*H. M. & A. H. Vories*, for plaintiff in error.

*Hall & Oliver*, and *Woodson & Jones*, for defendant in error.

I. The defendant in his answer having admitted that suit was brought by Wm. S. Peyton against Francis Marion Rose, by the name of Marion Rose, and that judgment was recovered as stated in said petition, was precluded from raising on the trial the question of variance between the said allegations of the petition and the record of said suit and judgment—*Cummings v. Gubridge*, 17 Mo. 470.

II. There is no variance between the allegations of the petition and the proof adduced on the trial—1 Greenl. Ev. 67; 1 Cow. & H. Notes to Phill. Ev. 674; 5 Pick. 232, 235; *Crane v. Dygel*, 4 Wend. 675; 4 Allen, 376; 7 Greenl. R. 131; *Beach et al. v. Curle's Adm'r*, 15 Mo. 115.

III. The facts set forth in the petition and proved on the trial entitle plaintiff to the relief decreed by the court—*Lilland v. McGee*, 4 Bibb, 165; *Fox v. Hill*, 1 Conn. 295; 18 Pick. 131; *Rankin v. Harper*, 23 Mo. 584; *Dunnica v. Coy*, 24 Mo. 168.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff recovered judgment in this action in the Buchanan Court of Common Pleas, which was affirmed on writ of error to the District Court of the fifth district, and the defendant appeals to this court.

The case appears to have been tried in the court below as a cause of action in the nature of a bill in equity. The general object of the petition was to have a conveyance declared void as being a fraud upon the rights of the plaintiff. It was alleged, among other things, that one Wm. S. Peyton, the father of the plaintiff, had brought a suit against one Francis Marion Rose for damages, and that, pending the suit, the said Rose had conveyed the farm in question to his brother,

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the defendant herein, with a fraudulent intent to avoid the payment of any judgment that might be recovered against him in said suit; that the plaintiff recovered a judgment therein for one thousand dollars damages; and that at the sheriff's sale, under execution issued upon said judgment, and levied upon this land, the plaintiff had become the purchaser at the price and sum of five dollars and received the sheriff's deed for the land; and the prayer was that said conveyance from Francis Marion Rose to the defendant be cancelled and held for naught, and that the plaintiff might have a judgment for the possession of said real estate.

Without going further at present with the statement of the case, it is apparent here, for one thing, that the plaintiff must show some right, title or interest in the land vested in herself before she can have any standing in a court of equity, or be in a position to question this conveyance, or to complain of the fraud alleged; and this is enough to call for a consideration of the questions of law arising upon the exceptions taken by the defendant to the admission of the evidence offered by the plaintiff for the purpose of proving a title vested in her.

The allegations were substantially that the suit had been brought by the plaintiff therein against Francis Marion Rose, by the style and description of Marion Rose, for the recovery of damages for the seduction of his daughter; that the plaintiff had recovered a judgment therein against said Francis Marion Rose for the sum of one thousand dollars damages; that the sheriff levied upon and sold, under the execution, all the right, title and interest of said Marion Rose in and to said real estate; that the plaintiff here, as the purchaser at the sale, received a deed from the sheriff for all the right, title and interest of said Francis Marion Rose in said real estate, and that during the pendency of the suit the said Francis Marion Rose had made the fraudulent conveyance in question, in collusion with the defendant, for the purpose of preventing a collection of the judgment to be obtained, and with intent to hinder, delay and defraud creditors. The

record, execution and sheriff's deed were all in the name of Marion Rose. The answer of the defendant ran in the name Francis Marion Rose (who is sued by the name of Marion Rose), and the evidence showed that his true name was Francis Marion Rose. The execution was for the sum of one thousand dollars damages and \$91.75 costs, and the names of the parties and the dates and amount of the judgment and execution were correctly written in the deed. Exception appears to have been taken to the admission of the deed for the reason that there was a variance between it and the judgment and execution; to the admission of the record, because it did not agree with the execution and deed in the names of the parties, and to admission of the execution, because there was a variance between it and the judgment and deed; but there was no exception on the ground of a variance between these proofs and the allegations of the petition. It is not clear what was meant by these exceptions. It is plain that there was no material variance between these documents when compared with one another, and there can be no doubt that the deed referred to this identical judgment and execution, and sufficiently recited the necessary parts. It was insisted more especially, that the petition had alleged a judgment against Francis Marion Rose, and that this was so far descriptive of the judgment that it must be exactly proved. It is a sufficient answer to this, that no exception was taken to the admissibility of the evidence on this ground, and it has often been held that such objections are waived unless made and excepted to on the trial; but even if the objection had been taken it would not avail, for the tenor of the petition is that the suit was commenced and the whole proceedings had against the defendant by the name and style of Marion Rose, and the fair construction would be that the allegation was that the judgment had been rendered against Francis Marion Rose by that name. We cannot say that there was any material error in admitting these documents; they supported the petition, and the title of the plaintiff, as against the judgment debtor, was sufficiently

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established for all the purposes of the relief to which the plaintiff could be entitled.

With regard to the decree that was rendered, there is more difficulty. The proceedings in the case exhibit much irregularity and confusion of ideas. The petition contains first a regular count in ejectment, and then proceeds with a bill of equity (apparently as a part of the same count), though each count might be considered as separately and distinctly stated. There was no demurrer for misjoinder, no motion to strike out or to elect in which count the case should be tried, no separate trial of ejectment, and no motion in arrest. The parties and the court appear to have treated the petition as one count, and that one as being a bill in equity; it was heard as such without any trial by jury before the court sitting in chancery; no waiver of a trial by jury appears of record, and the court granted all the relief that was asked for in the whole petition, excepting only the assessment of the monthly value of the premises. It can scarcely be necessary to say, that such a mode of proceeding is not only irregular in practice, and likely to be greatly prejudicial to the rights of the parties, but is fatally erroneous on writ of error or appeal, and cannot be sustained. Such matters should be disposed of on demurrer or motion before trial; but we must notice here substantial errors appearing on the face of the record.

It has been held that where matters of law and equity are blended in the same count, the court will not sift it narrowly to see whether or not a good cause of action can be made out either at law or in equity, by rejecting all the rest as surplusage; but it will be held on demurrer, or in arrest, or on writ of error or appeal, as not containing any cause of action whatever which the court can recognize. Where some cause of action is so stated as to be clearly made out, the other matters will be rejected as surplusage. This subject has been dwelt upon in several cases—*Mooney v. Kennett*, 19 Mo. 551; *Meyers v. Field*, 37 Mo. 434; *Miltenberger v. Morrison*, 39 Mo. 71; *Billon v. Larimore*, 37 Mo. 386.

We see no better way than to consider this petition (as it was treated below) as one count in the nature of a bill in equity, altogether disregarding the ejectment as surplusage. If it might be understood as containing two counts, then there was error in hearing both at once as a chancery proceeding. In an action at law there is a constitutional right of trial by jury which has no existence in equity. There has been properly no trial of the ejectment at all, but only a hearing on the count in equity. The only relief prayed for in this count is, that the conveyance from Francis Marion Rose to the defendant may be cancelled and held for naught, and that the plaintiff may have a judgment for the possession of the land. It has been held that the prayer for relief is an essential part of the petition. The relief granted was, first, that the deed be annulled as against the plaintiff; second, that the title which Francis Marion Rose had in the land at the date of his deed to the defendant be vested, in fee simple in the plaintiff, and this relief was neither asked for, nor warranted by the facts stated in the petition; and third, that the plaintiff receive possession of the land, and one cent damages for the detention thereof and her costs, and have thereof execution; and this, though prayed for in the count, could only be granted in the action of ejectment.

A bill in equity is not the proper remedy for the recovery of the possession of real estate; for that purpose there is adequate remedy at law in the action of ejectment. If an action at law and a cause of action belonging to equitable jurisdiction can properly be united in the same petition under either of the classes of claims mentioned in the practice act (Gen. Acts 1865, ch. 165, § 2), they must still be separately stated, and must necessarily have a separate trial, inasmuch as the mode of trial and the rules of proceeding are essentially different, and the judgments must be different—*Janney v. Spedden*, 38 Mo. 395. There was no occasion for a decree vesting title in the plaintiff, nor was it a proper case for such relief. If the deed from Rose to the defendant were fraudulent and void, it conveyed no title to him as against the

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plaintiff. If the judgment sale and sheriff's deed to the plaintiff were valid in law, they conveyed the title of the judgment debtor to the plaintiff; and if the possession were withheld from her, she had her action of ejectment in which her title at law could have properly come under investigation. But the prior deed would be held to convey the title, unless avoided on the ground of fraud. Fraud may be proved at law as well as in equity, but the remedy at law in such case may not be adequate and effectual. A court of equity furnishes a more effectual remedy in such cases, and unquestionably has jurisdiction to annul the conveyance on the ground of fraud, and the aid of the court is sought for that purpose. When the deed is thus declared void as against the plaintiff, it is removed out of the way of her action at law. The record of the decree is admissible in evidence in the ejectment suit, and that is all the relief she needs, or can have from a court of equity. If the case were, that the plaintiff had the equitable right, and the defendant the naked legal title only, it might be proper for the court to vest the legal title in her by decree; but here is no such case. When a court of equity, acquires jurisdiction for any purpose, it will sometimes proceed to grant complete relief, so far at least as the rules of equity will admit, and the court is competent to give it, according to the nature of the case; but where there is an adequate and complete remedy at law, and the case is made properly triable at law, the party will be remitted to her action at law. Here we think the proper remedy of the plaintiff for the recovery of the possession of the land is the action of ejectment, in which the damages and the monthly value of the premises can be assessed by a jury. But she is entitled on the case as it stands to have this conveyance declared void as against her title. We have examined the evidence touching the matter of fraud, and are satisfied that it was sufficient to sustain the decree granting her this relief. In this respect, we see no reason for interfering with the judgment of the court below; nor do we

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see any occasion for remanding the cause for a rehearing on this part of the case.

The judgment will therefore be reversed, and this court, proceeding to render such judgment as ought to have been given below, will order and direct that judgment be entered in this court in favor of the plaintiff against the defendant, to the effect that the said conveyance from Francis Marion Rose to the defendant be and is hereby declared null and void as against the title acquired by the plaintiff under a deed from the sheriff aforesaid, and for costs. The other judges concur.



C. M. BOYD, Adm'r of CHESTER CARR, Defendant in Error,  
v. BARBARA HURLBUT, Adm'x of HILLMAN HURLBUT, Plain-  
tiff in Error.

*Limitations—New Promise—Action.*—A promise to pay a debt barred by the statute of limitations does not give a new cause of action, and the suit is properly brought upon the original contract. Under the statute, the promise to take the case out of the statute must be in writing, must acknowledge the debt from which the law will imply the promise, or promise payment. Where the plaintiff, to remove the bar, proves a general acknowledgment of indebtedness in writing, the burden of proof is upon the defendant to show that it related to a different demand from that in controversy.

*Error to the Fifth District Court.*

*Woodson & Merryuan*, for plaintiff in error.

I. There is no question that the statute of limitations operates as a bar to a recovery of the note sued on, unless a new promise sufficient to take the case out of the operation of the statute has been shown.

II. No new promise has been shown to defeat the effectual bar set up under the statute of limitations; the promise relied on is not sufficient—Ang. on Lim. §§ 219–25; 3 Mo. 155; 5 208; 6 Mo. 21; 23 U. S. D. 386, §§ 102–3; Moore v. Bank of Columbia, 6 Pet. 86, and authorities; 1 Pet. 351. The

new promise must be in writing, and passed upon by the court—3 Pars. on Cont. 68, and authorities cited.

III. The statute of limitations was a bar to the maintenance of any suit upon the note upon which the action is founded. If a new promise or acknowledgment of the note sued on in writing was ever made, this suit ought to have been brought upon this new promise, and cannot be maintained upon the original note, it being admitted and shown fully by the evidence that more than ten years expired after the maturity of the note before suit was brought or any new promise made—4 Dana, 505; Ang. on Lim. §§ 224, 227; McKean v. Thorpe, 4 Mo. 358; Davis v. Herring, 6 Mo. 21; Elliott v. Leake, 5 Mo. 208; Buckner v. Wheaton, 4 Mo. 100; 6 McLean, 190; 6 Geo. 21; 32 Barb. 139; 31 Miss. 95; How v. Saunders, 31 Me. 352; 20 Texas, 77; 17 Ohio, 9.

IV. If the promise or acknowledgment relied upon be made after the claim is barred by the statute, then the suit must be upon the new promise—Ang. on Lim. § 254; Burleigh v. Scott, 8 Barn. & C. 36; 11 Pick. 331.

*Vories & Vories*, for defendant in error.

Our statute requires that an acknowledgment of, or promise to pay, a debt otherwise barred by the statute of limitations, shall be in writing, and signed by the party making the same, in order to relieve it from the bar of the statute. This statute does not, however, require any other or different acknowledgment or promise than would have been sufficient before the statute (if orally made) to take a debt out of the operation of the statute of limitations; it is only required now to be in writing, or rather the evidence of the promise, &c., must now be in writing—7 Bing. 163; 2 Pick. 368; 22 Pick. 291.

The letters read in evidence contained both an acknowledgment of indebtedness and a promise to pay, either of which was sufficient to remove the bar of the statute, and the court should have so instructed the jury—Bernard v. Willie, 22 Pick. 291; Bangs v. Hall, 2 Pick. 368; Hayden v.

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Williams, 7 Bing. 163; 2 Greenl. Ev. §§ 441-43, and cases referred to; Ang. on Lim. 244, n., 247, 255; 2 Stark. Ev. 470-82.

If a general acknowledgment of indebtedness is made and one indebtedness is shown to have existed, the law will presume the acknowledgment to have referred to said indebtedness in the absence of proof to the contrary, and the burden is on the defendant to show that it referred to a different debt—Greenl. on Ev. § 441, &c.; Bailey v. Crow, 21 Pick. 323; Woodbridge v. Allen, 12 Metc. 470; Kales v. Kelly, 2 Texas, 541; Brown v. State Bk., 5 Eng. (Ark.) 134; Wood v. Wilds, 6 Eng. (Ark.) 754; Gray v. James, 6 Gill, 82; Whiting v. Bigelow, 4 Pick. 110; French v. Burgough, 1 Bing. 266; 1 Esp. 435; Elliott v. Leake, 5 Mo. 208; Davis v. Herring, 6 Mo. 21; 2 Stark. Ev. 482, &c.

Whether the acknowledgment or promise relied on is sufficient to take the case out of the statute of limitations, is a question of law for the court; but whether the promise or acknowledgment referred to the debt in question, is a question of fact for the jury—Dickenson v. Hatfield, 1 Moody & R. 141; Bird v. Gorman, 3 Bing. (N. C.) 883; Waller v. Lacey, 1 Man. & G. 54; Williams v. Griffith, 3 Esp. 335; Haybacker v. Rees, 12 Pa. 264; Davis v. Spanner, 14 Pa. 275; Densmore v. Densmore, 3 Shep. 433; Hayden v. Williams, 7 Bing. 163; 22 Pick. 291.

The action was properly brought on the note—the proper practice being to sue on the original cause of action; and when the statute is pleaded, set up the promise relied on in the replication—Ang. on Lim. 337, old ed.; Leaper v. Talton; 16 East. 423; Williams v. Dyde, Peck, 68; Yea v. Fouraker, 2 Burr. 1099; Clark v. Bradshaw, 3 Esp. 155; Brian v. Horseman, 4 East, 599; Sluby v. Champlin, 4 Johns. 451; Baxter v. Penniman, 8 Mass. 133; Shippey v. Henderson, 14 Johns. 178; Hadsten v. Haindge, 2 Sands. 63; 2 Hawks, 209; 2 Dev. & B. (N. C.) 375; 4 Harr. & J. 485; 4 Johns. 461; 8 Wend. 601; Low v. Shaler, 3 Cow. 131; Heylise v. Hastings, 4 Carth. 471; Homer v. Fish, 1 Pick.

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435; 3 Pick. 75; *Martin v. Williams*, 17 Johns. 330; *Johnson v. Beardslee*, 15 Johns. 4.

Our statute only declares that civil actions shall not be commenced, &c.; does not destroy the original cause of action, but on the contrary provides that an action may be commenced if an after promise in writing be made. (See the cases above cited.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his suit in Platte county on a promissory note, made by defendant's intestate, and on the trial the statute of limitations was pleaded as a defence. To remove the obstacle interposed by the statute, the plaintiff introduced letters written by the maker of the note to the payee in his lifetime acknowledging an indebtedness, and stating that he was making arrangements and hoped to be able to pay three hundred dollars by the first of January then next ensuing after the date of the letter, and several hundred dollars each year thereafter. The note was for upwards of sixteen hundred dollars, and the letters were not written till more than ten years had elapsed after the making and executing the same. The letters referred to no special or particular debt, and the Circuit Court held that the acknowledgments and promises contained in them were insufficient evidence to revive the cause of action, and by its instructions withdrew it entirely from the consideration of the jury. Judgment having been rendered for the defendants, the cause was taken to the District Court sitting at St. Joseph, where the judgment of the Circuit Court was reversed, and the cause remanded, and from the decision of the District Court the defendants have prosecuted their writ of error.

The acknowledgments and promises to pay were contained in writing, in compliance with the statute, and if they were made in a sufficiently clear and explicit manner, and by their terms they were unequivocal and determinate, they will completely destroy the defence sought to be set up as a bar. To take a case out of the statute of limitations there

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should be either an express promise to pay, or an acknowledgment of an actual subsisting debt, on which the law would imply a promise, and it will be sufficient if the party acknowledges the indebtedness, and that it remains unpaid without any expression of willingness to remain bound—*Buckner v. Johnson*, 4 Mo. 100 ; *Elliott v. Leake*, 5 Mo. 208.

But if the acknowledgment is accompanied with conditions or circumstances which repel or rebut the presumption of a promise or intention to pay ; or if the expressions used be vague, equivocal or ambiguous, leading to no certain or determinate conclusion, they will not satisfy the requirements of the statute, and the evidence ought not to be submitted to a jury for them to found a verdict on mere inference—2 Greenl. on Ev. § 440, & n. 3.

In the leading case of *Bell v. Morrison*, 1 Pet. 362, Mr. Justice Story says :—" If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and to be in its terms unequivocal and determinate ; and if any conditions are annexed, they ought to be shown to be performed ; if there is no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay ; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries." The acknowledgment in this case is unquestionable, and the promise explicit and clear.

But it is contended that neither the acknowledgment nor promise refer to any particular or definite debt, and that there is no means of applying them to the demand sued on. In *Clark v. Dutcher*, 9 Cow. 674, the court say, "it ought clearly to appear in all such cases, that the acknowledgment related to the identical debt or demand which is sought to be recovered upon the strength of it." On the other hand, it has been held that where the plaintiff proves a general acknowledgment of indebtedment, the burden of proof is on the defendant to show that it related to a different demand from the one in controversy—2 Greenl. Ev. § 441; *Whiting v. Bigelow*, 4 Pick. 110; *Bailey v. Crane*, 21 Pick. 324; *Woodbridge v. Allen*, 12 Metc. 470; *Frost v. Burgough*, 1 Bing. 266. Now, in the case at bar, if the acknowledgment and promise were made in relation to the debt in suit they would be sufficient to remove the barrier of the statute, and create an action at law. Whether they referred to this debt or to some other, was a question of fact to be tried by a jury. As the plaintiff declared on a debt to which the acknowledgment might apply, the jury would be at perfect liberty to infer that this was the identical debt, and bring in their verdict accordingly, unless the defendant repelled the presumption or inference arising from the circumstances, by showing a different debt, in reference to which the acknowledgment or declaration was made.

Another position has been assumed by counsel, and that is, that the action should have been brought upon the promise, and not upon the original contract. Upon this point there have been conflicting decisions, but upon reason and the decided weight of authority we think the action was properly brought on the original contract or cause of action. The statute of limitations does not annihilate the debt, but suspends the remedy; the promise does not give any new cause of action, but simply revives the old cause, and is of no other use than to prevent the bar of the statute—*Leaper v. Talton*, 16 East. 423; *Yea v. Fouraker*, 3 Burr. 1099; *Sluby v. Champlin*, 4 Johns. 451; *Shippey v. Henderson*, 14

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Johns. 178; Baxter v. Penniman, 8 Mass. 133; Low v. Shaler, 3 Conn. 131.

The judgment of the District Court must be affirmed. The other judges concur.

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STEPHEN G. HOYT, Plaintiff in Error, v. A. G. WILLIAMS, Garnishee of LASLEY *et al.*, Defendant in Error.

*Practice—Bill of Exceptions—Error—Supreme Court.*—The Supreme Court will not review the errors committed at the trial in the inferior court unless the errors be saved by bill of exceptions. If the judge refuse to allow and sign the bill, it may be signed by three bystanders (G. S. 1865, ch. 169, § 29); but if the exceptions be not made part of the record by the bill, there is nothing preserved upon which the appellate court can act.

*Error to the Fifth District Court.*

FAGG, Judge, delivered the opinion of the court.

This was a proceeding commenced in the Weston Court of Common Pleas. The defendant in error, Williams, was summoned to answer as garnishee under an execution issued from the office of the clerk of that court, in favor of Hoyt, and against Lasley and Allgaier. There was a trial upon the issues presented by the interrogatories and answer, which resulted in a verdict and judgment for the garnishee. An appeal was taken to the Fifth District Court and the judgment of the court below reversed. The cause is now brought here by writ of error.

The first question present by the record is whether there is such a bill of exceptions preserved as will authorize this court to examine the errors complained of. We think there is not.

There are two modes pointed out in the statutes by which a bill of exceptions may be perfected so as to become a part of the record in a cause, neither one of which has been pursued in this instance. The first is to have it allowed and signed by the judge trying the cause. If, however, he refuses

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to do so, it should be signed by three bystanders—sec. 30, ch. 169, G. S. 1865. Sec. 29 of the same chapter provides as follows: "If the judge refuse to sign such bill on the ground that it is untrue, he shall certify thereon under his hand the cause of such refusal." There seems to have been an effort in this case to comply with that requirement. The fact is stated by the judge in an endorsement upon the bill of exceptions, as presented for his signature, that he refused to sign the same because it was untrue. The reasons for this refusal are set out at some length. A copy of this endorsement appears in the transcript, but there was no further effort made to perfect it, and no evidence that the bill was filed so as to become properly a part of the record in the case.

We do not feel at liberty to disregard the plain provisions of the law in reference to this matter. In the absence of the proof necessary to make the record complete, we do not feel authorized to review the action of the Court of Common Pleas. The judgment of the District Court must be reversed. The other judges concur.

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HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Plaintiff in Error, v. PATRICK S. KENNEY, Defendant in Error.

1. *Practice—Pleadings—Negligence—Railroad Corporations.*—A petition by a railroad company charging that the animals of defendant unlawfully and by reason of the negligence of defendant entered upon the track of the road, and thereby plaintiff was injured, shows a good cause of action; plaintiff is not required to set forth the evidence in his pleadings, nor to set out the facts which show negligence in the defendant.
2. *Inclosures—Damages—Negligence—Railroad Corporations.*—By the law of this State the owner of animals is not bound to confine his stock within his own enclosures, and he is guilty of no negligence in not confining them; but although he is not bound to fence them in, he may be guilty of such wilfulness or negligence in regard to his animals as to render himself liable to a railroad company for damages caused by their being upon the track.

*Error to Fifth District Court.*

*Carr, and Hall & Oliver, for plaintiff in error.*

The petition states facts sufficient to constitute a cause of

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action—Kimbacker v. Clev., Col. & Cin. R.R. Co., 3 Ohio, 172, n. ed., and authorities cited.

*Vories & Vories*, for defendant in error.

The only question in this case presented to the court is whether the petition sets up any facts or charges any acts, either of commission or omission, on the part of the defendant, which would by the law amount to negligence for which he would be responsible in damages. It is contended by the defendant that there are no facts or acts of negligence alleged. The pleader seems to rely on the facts simply that the defendant's mules were permitted to run at large upon the prairie, the common, as nothing else is alleged either directly or by inference; or, in other words, it seems to be assumed that it was the duty of the defendant to keep his mules up in his own enclosure, or that in default thereof he would be responsible for what they might do, or for where they might go, upon the enclosed land of others. This has never been held to be the law in this country, but the reverse has been invariably held, at least in the Western States, and in this State in reference to domestic animals—*Canefox v. Crenshaw*, 24 Mo. 199, and cases cited; *Holliday v. Marsh*, 3 Wend. 142; *Bush v. Brainard*, 1 Cow. 78, and note.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff sues for damages done to the railroad and a running train in consequence of the defendant's mules getting upon the track. It is alleged that the plaintiff was the owner of the railroad, and was running a passenger express train on the road, at night, in the county of Caldwell, when a large number of mules belonging to the defendant, unlawfully and by reason of the defendant's negligence, entered and were upon the track at a point where it was not the duty of the plaintiff to erect and maintain fences, and that without any negligence on the part of the plaintiff the train came in contact with the mules, causing damage to the locomotive, train and road, to the amount of \$20,000, for which judgment is

asked. The case is presented here on demurrer to the petition for the reason that it does not state facts sufficient to constitute a cause of action. It is urged in support of the demurrer, that the petition does not state any facts nor charge any acts of omission or commission on the part of the defendant, which in law amount to negligence for which the defendant is responsible in damages, and that it appears to be assumed that it was the duty of defendant to keep his mules in his own enclosure, and that in default thereof he would be responsible for any damage which they might do by going upon the enclosed land of others.

We cannot sustain this view of the matter. The fact is stated that the defendant's mules had got upon the track unlawfully and by reason of the negligence of the defendant; it is not merely that the mules had strayed upon the track without his fault or knowledge. It is not necessarily assumed that the defendant was bound to keep the mules in his own enclosure, but it is positively averred that they were on the track by reason of his negligence. The trespass of the mules may be his own trespass as well, and he is certainly responsible for his own negligence if the negligence averred can be proved. The existence of negligence is a matter of fact, and must be proved like any other fact. The question what circumstances would amount to proof of negligence, or would show negligence, would more properly arise when the evidence should be produced—*Lee v. Cox*, 16 Mo. 166. It is settled law in this State, that the owner of animals is by our law under no obligation to fence them in; that is, in not confining them, he is in no fault, nor is he guilty of any negligence—*Gorman v. Pacific R.R.*, 26 Mo. 441. But it was said in this case that "although the owner of animals is not bound to fence them in, yet there may arise a state of circumstances showing that he was guilty of such wilfulness or negligence in regard to his animals as would prevent a recovery of damages for their destruction"; and for the same reason we think he might be liable to the company for the damage done by them. The allegations

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show a good cause of action. By what evidence the plaintiff will undertake to sustain them we, of course, cannot say, nor is it necessary that he should set forth his evidence in the petition. It may happen that no other evidence can be produced than the mere omission to enclose his cattle, and that no negligence can be proved on the part of the plaintiff; and if the negligence of both parties were only the remote, and neither the proximate cause of the damage, it might present a case of unavoidable accident, or simple misadventure, for which none could be held responsible—*Kimbacker v. Clev., C. & C. R.R. Co.*, 3 Ohio, 172. But no opinion need be given on such questions until they arise upon the trial of the cause. The subject has been considered by this court in several cases, and need be no further discussed at this time—*Gorman v. Pacific R.R.*, 26 Mo. 441; *Clark's Adm'x v. Han. & St. Jo. R.R. Co.*, 36 Mo. 202.

We are of opinion that the petition states a good cause of action, and that the demurrer should have been overruled.

Judgment reversed and the cause remanded.



THE FARMERS' BANK OF MISSOURI, Appellant, *v.* THOMAS H. BAYLISS, JOHN W. SHOTWELL (Adm'r of the Estate of JAS. F. HUDGINS, dec'd), WILLIAM HUDGINS, HENRY C. GARNER, GEO. F. STEWART, and THOS. L. SHAW, Respondents.

1. *Practice—Pleading—Causes of Action—Motion to strike out.*—Where a cause of action upon a note is united with a cause of action upon the consideration thereof, the defect must be reached by motion to strike out the surplus matter.
2. *Practice—Pleading—Causes of Action—Parties—Demurrer.*—Where a cause of action to which some of the parties are liable is united in the same count with a cause of action against other parties who are not liable upon the first cause stated, the defect may be reached by demurrer or motion in arrest of judgment.—G. S. 1865, ch. 165, § 6.
3. *Practice—Parties—Joinder—Judgment—Error.*—A joint judgment against several parties not jointly liable is erroneous, and the judgment will upon motion be arrested, or be reversed for error.

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4. *Practice—Motions for New Trial and in Arrest.*—Where motions for new trial and in arrest of judgment are filed upon the same day, it will be presumed that the motion for a new trial was first filed in order of time.
5. *Partnership—Action—Note.*—Where one of several partners executes a note in his own name for money borrowed, no action can be maintained against the firm for the consideration of the note, although the money may have been borrowed for the firm and applied to partnership purposes. The money received upon the note will be treated as an advance to the firm by the partner executing the note, and not as a loan to the partnership. See S. C. 35 Mo. 428.

*Appeal from Fifth District Court.*

The amended petition was as follows :

Plaintiff states that said plaintiff in the lifetime of the said defendant James F. Hudgins, deceased, to-wit, on the 25th day of December, in the year of our Lord 1862, at the special instance and request of the said defendant, loaned to the said defendants William Hudgins, James F. Hudgins and Thomas H. Bayliss, and said last named defendants then and there borrowed of and from the said plaintiff the sum of thirty-seven hundred dollars, to be paid by the said defendants to the said plaintiff six months then next after the date thereof; and plaintiff states that the said defendants William Hudgins, James F. Hudgins and Thomas H. Bayliss were then and there co-partners in trade and business under the name and style of Wm. Hudgins & Co., and that said sum of thirty-seven hundred dollars was so loaned by the said plaintiff and borrowed by the said Wm. Hudgins & Co. for the use and benefit of the said Wm. Hudgins & Co., and the same was received and used by the said Wm. Hudgins & Co. in their said firm and co-partnership business; and the said plaintiff says the money aforesaid was originally loaned to the said William Hudgins & Co. on the 27th day of January, A. D. 1858, and the note of James F. Hudgins and others given to secure the same, and that the said loan and note were renewed from time to time until the 25th day of December, A. D. 1862, on which last mentioned day the said loan and note were renewed and the note hereinafter mentioned was given, and that upon each renewal of said loan and note the said Wm.

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Hudgins & Co. paid to the plaintiff the interest that had accrued upon said loan, and that the said Wm. Hudgins & Co. made the last payment of the interest upon said loan on the said 25th day of December, A. D. 1862; and since then, at different times, the said defendant Thomas H. Bayliss promised the plaintiff that the firm of Wm. Hudgins & Co. (of which he was a member) would pay to plaintiff the principal and interest of said loan and note. And the said plaintiff says that at the time of said loaning and borrowing, the said James F. Hudgins as principal and the said Henry C. Garner as his security, in consideration thereof and for the purpose of securing the payment thereof, executed their negotiable promissory note, dated on the said 25th day of December, A. D. 1862, for the said sum of thirty-seven hundred dollars, six months after the date thereof, to the order of George H. Stewart, who then and there endorsed the same to the order of Thomas L. Shaw, who thereupon endorsed the same to the order of the plaintiff, and then and there delivered the same to the plaintiff, which said note was payable at the Farmers' Bank of Missouri; and the plaintiff says that on the 28th day of June, A. D. 1863, at the Farmers' Bank of Missouri, payment of the amount specified in said note was demanded of the said parties to said note, and the payment thereof was refused by the said parties to said note, and the said note was on the day and year last aforesaid duly protested, of which due notice on the day and year last aforesaid was given to the said parties to the said note, which said note is herewith filed and shown to the court here.

Plaintiff states that the said defendant James F. Hudgins departed this life on the 27th day of December, A. D. 1862, and that the said William Hudgins and Thomas H. Bayliss are the surviving members of the said firm of Wm. Hudgins & Co., and that the said defendant Thomas H. Bayliss as surviving partner, is administrator of the partnership effects of the late firm of Wm. Hudgins & Co., and that John W. Shotwell is the administrator of the estate of James F. Hudgins, deceased, duly qualified as such.

Plaintiff states that said sum of thirty-seven hundred dollars so loaned and borrowed as aforesaid, and so secured as aforesaid, and all the interest accruing thereon, is yet due to said plaintiff, for which it asks judgment.

The plaintiff asked the following instructions :

1. If the jury believe from the evidence that the firm of Wm. Hudgins & Co. borrowed from the plaintiff the sum of \$3,700, and that the same was so borrowed for the use of the firm and was used by the firm of Wm. Hudgins & Co., the plaintiff is entitled to recover the money so borrowed and used by the firm from the members of the said firm of Wm. Hudgins & Co.; and if the note mentioned in the petition was given to secure the payment of the said sum of money so borrowed as aforesaid by said firm, then plaintiff may recover against the securities and endorsers on said note.

2. That the books of Wm. Hudgins & Co. showing that the sum of \$3,700 so borrowed was used by the firm of Wm. Hudgins & Co., and that the interest on the same was paid by the firm, is evidence against the members of the firm that the firm recognized it as a firm debt.

3. It is immaterial whether, at the time the money was borrowed, the plaintiff knew that the firm of Wm. Hudgins & Co. were to receive and use the money, and be bound for the payment of the same or not, the plaintiff is entitled to recover of the firm of Wm. Hudgins & Co. if they did so borrow, receive and use the money.

4. The admissions of a member of the firm during the existence of the firm and in relation to the firm business are evidence against the members of the firm, and the admissions of a member of the firm after the dissolution of the partnership are evidence against the member so making such admissions.

To which the defendant Bayliss and Hudgins objected.

The defendants, Garner, Shaw, and Stewart, asked the court to give the following instructions :

1. If the jury find from the evidence that the defendant

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Henry C. Garner became security upon the note mentioned in the petition, and that the defendants George H. Stewart and Thomas L. Shaw became endorsers upon said note upon the representation of the defendant Thos. H. Bayliss at the time he was a member of the firm of Wm. Hudgins & Co., and that the firm of Wm. Hudgins & Co. had borrowed the money and would pay the debt, the jury will find for the plaintiff against the members of the firm of Wm. Hudgins & Co. as well as against these defendants.

2. If the firm of Wm. Hudgins & Co. borrowed the money specified in the petition, the jury cannot find against the defendants unless they also find against the members of the firm of Wm. Hudgins & Co.

To which the defendants Bayliss and Hudgins also objected.

The defendants Bayliss and Hudgins asked the court to give the following instructions :

1. This suit, so far as the defendants William Hudgins and Thomas H. Bayliss are concerned, is for money loaned by the plaintiff to the defendants, said Hudgins and Bayliss and James F. Hudgins, composing the firm of Wm. Hudgins & Co.; and before the plaintiff can recover against said William Hudgins and Thos. H. Bayliss in this action, the jury must believe from the evidence that the money sued for was loaned by the plaintiff to said firm of Wm. Hudgins & Co.; and even though the jury may believe from the evidence that the money sued for was placed in the firm of Wm. Hudgins & Co. and was used by said firm, and even though said Bayliss may after such loaning have promised the administrator of James F. Hudgins, deceased, and other persons, to pay the said debt, or any note given therefor, or any note given in renewal, or any note given for said money so loaned, and though said Thos. H. Bayliss may have acknowledged that it was a firm debt of said Wm. Hudgins & Co., yet unless the jury further find that the original loan was made by said plaintiff to said firm of Wm. Hudgins & Co. and on their credit, the plaintiff cannot recover in this action.

2. No contract of loan could have been made by plaintiff and said firm except with the knowledge and consent of both parties to such contract ; and such a contract on the part of said firm must have been made by said firm, or by one of the members thereof in the name and on behalf of said firm.

3. If the jury believe from the evidence that the money sued for was loaned by the plaintiff to James F. Hudgins, and that at the time of such loaning the said James F. Hudgins gave his note with securities and endorsers to said plaintiff therefor, and that said note was renewed from time to time by Jas. F. Hudgins to said plaintiff until the note in the petition mentioned was given upon the last renewal, and that credit was given by said plaintiff to the parties on said note for the sum so borrowed ; and though the jury may believe from the evidence that the money so borrowed by said Jas. F. Hudgins of plaintiff was placed in the firm of Wm. Hudgins & Co. and was used by the firm in their partnership business, even though said Bayliss may after such loaning of said money by plaintiff have promised the administrator of James F. Hudgins and other persons to pay said debt, or any note given therefor or in renewal thereof, and even though said Bayliss may have acknowledged said debt to have been a debt of the firm of Wm. Hudgins & Co., nevertheless the jury must find for defendants Bayliss and Wm. Hudgins in this action. Though the jury may believe from the evidence that the money sued for was loaned by plaintiff to the firm of Wm. Hudgins & Co., yet if the jury further believe from the evidence that at the time of loaning said money the plaintiff took as security for the payment thereof the individual note of James F. Hudgins with other persons as securities and endorsers, and that said note was from time to time renewed by the said Jas. F. Hudgins with other persons as securities and endorsers, then the plaintiff, by taking such note with security, in law discharged the other members of the firm from all liability on account of such loaning of said money to said firm, and relied upon their se-

curity so taken by such notes, and the jury must find for the defendants Bayliss and Wm. Hudgins in this action.

5. Any declaration made by Bayliss, after the original borrowing of this money by the said Jas. F. Hudgins, as to his liability or the liability of the firm of Wm. Hudgins & Co. to third persons, not to plaintiff in this action as to his liability for the debt or the firm liability, is not binding for want of consideration, for the further consideration and fact that the promise was not in writing.

To which the plaintiff and the defendants Garner, Shaw and Stewart objected.

The court, in lieu of all the aforesaid instructions, gave to the jury the following:

1. If the jury find from the evidence that plaintiff loaned to Wm. Hudgins & Co. (a firm composed of William Hudgins, James F. Hudgins, and Thomas H. Bayliss) the sum of \$3,700, they will find the issue for the plaintiff; but if the jury do not find from the evidence that plaintiff did lend the sum of \$3,700 to defendants Wm. Hudgins & Co. (a firm composed of William Hudgins, James F. Hudgins, and Thos. H. Bayliss), they will find for the defendants.

2. If the jury find from the evidence that James F. Hudgins was a member of the firm of Wm. Hudgins & Co., and that said Jas. F. Hudgins borrowed \$3,700 of plaintiff upon the credit of said Wm. Hudgins & Co., and the credit further of the other defendants, they will find for the plaintiff; but if the jury find from the evidence that said Jas. F. Hudgins did not borrow said sum upon plaintiff's faith and credit extended to the firm of Wm. Hudgins & Co. and the other defendants, they will find for the defendants.

3. The jury are instructed that declarations made by a member of an existing firm touching its business will bind all the members thereof; and, therefore, if the jury find from the evidence that, at or before the date of the loan of \$3,700 by plaintiff, any member of the firm of Wm. Hudgins & Co. declared to plaintiff that the sum was borrowed upon the

credit and for the use of said firm, then plaintiff is entitled to rely upon such declaration, and the finding must be for the plaintiff; but unless the jury find from the evidence that at or prior to said loan such declaration was made to plaintiff, or came to plaintiff's knowledge, and was relied on as a part inducement or reason for extending the credit to the firm, and that the credit accordingly extended to the firm of Wm. Hudgins & Co. and other defendants, the jury will find for the defendants.

4. The jury are instructed that declarations made by any member of the firm of Wm. Hudgins & Co. subsequent to the loan as to the debt being a firm debt, is evidence to be considered by the jury in determining the question whether or not the money was in point of fact borrowed by Jas. F. Hudgins upon faith and credit extended to the firm by plaintiff; and, accordingly, if the jury believe from the evidence, coupling subsequent declarations with other facts and circumstances proven, that Jas. F. Hudgins, at or prior to the borrowing, represented to plaintiff, or so represented so that it came to the knowledge of plaintiff, that said sum was to be borrowed on firm credit in part, and that upon the faith thereof credit was extended to the firm, then they will find for the plaintiff; but unless the jury believe from the whole evidence that said sum was borrowed upon faith and credit extended to the firm of Wm. Hudgins & Co., they will find for the defendants.

5. The jury are instructed that declarations made pending the existence of the firm, by any member thereof, prior to the signing of the note filed, to the securities and endorsers, that such note was on firm account, would bind the firm in any action between said firm and the makers, securities and endorsers of said note; and in this action if it appear to the jury from the evidence that said declarations by a member of the existing firm were also made to, or came to the knowledge of, plaintiff prior to the negotiation of the note, and that upon the faith of such declarations plaintiff extended credit in part to the firm of Wm. Hudgins & Co., the jury

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will find for the plaintiff; but if it appear to the jury from the evidence that said or similar declarations were not made to or came to the knowledge of plaintiff, and that the plaintiff did not extend credit in part to said firm in consequence of such declarations, then the finding should be for the defendants notwithstanding any representations made only to securities and endorsers.

To the giving of which instructions by the court, and to the refusal by the court to give the instructions asked by Bayliss and Hudgins, defendants at the time excepted.

*Hall & Oliver*, for appellant.

I. A motion in arrest of judgment being filed precludes a motion for a new trial, and supersedes such a motion if already made. The record shows that a motion in arrest of judgment was filed in this case, and that afterwards a motion for a new trial; in other words, no motion for a new trial was filed at all in this case. A motion illegally filed is the same as not filed—20 U. S. Dig. 697, § 250; 18 id. 546, § 144; *McComas v. State*, 11 Mo. 117.

II. If no motion for a new trial be made in the court which tried the case, neither the action of the court in giving or refusing instructions or admitting or excluding evidence, nor of the jury in finding the verdict, will be considered by the Superior Court—*Higgins v. Brant*, 9 Mo. 497.

III. Under this view, the only matter before the court relates to the sufficiency of the facts stated in the petition to constitute a cause of action. The defendants waived all objections on the ground of a misjoinder of parties, or of actions, by answering the petition—R. C. 1855, p. 1231, § 10.

IV. The District Court decided that there is no evidence in this case against defendants Hudgins and Bayliss. Plaintiff insists that the evidence warrants the judgment of the Circuit Court—5 Pet. 137; *S. Car. Bk. v. Corse*, 8 Barn. & Cress. 427; 3 Kent's Com. 31; *Sto. on Part.* §§ 162, 137, 138; *Farmers' Bk. v. Hudgens et als.*, 35 Mo. 440, 445; 22 Mo. 400; *Bank v. Joy*, 41 Me. 572.

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V. If a partner make a simple contract for his firm in his own name, or if an agent make a simple contract for his principal in his own name, the partnership in the one case and the principal in the other are bound by the contract whether the partnership or principal are known or unknown to the other contracting party at the time of the contract—Sto. Ag. 160, (*a*); 22 Mo. 399.

VI. It is of no importance whether the petition in this case be founded on the note therein described, or on the original consideration. The question is, do the facts alleged in the petition and proved on the trial entitle plaintiff to judgment against defendants Wm. Hudgins and Bayliss? The note executed by Jas. F. Hudgins for the money loaned by plaintiff was no payment of the debt created by the loan, and the note not having been paid, plaintiff is entitled to recover the money loaned—10 Wend. 271; 4 Carr. & P. 121; Sto. on Prom. N. § 404; Appleton v. Kennon, 19 Mo. 639; 5 Day, p. 511.

*Vories & Vories*, for respondents.

I. The petition attempts to set up two separate and distinct causes of action in one count, without stating them separately as the statute requires. One cause of action attempted to be set up is in the nature of a common count for money loaned, and is against the firm of Wm. Hudgins & Co. or the members who constituted that firm, and in the same count is joined a cause of action against the other defendants growing out of their liability as makers and endorsers of a negotiable promissory note to which the defendants Hudgins & Bayliss are not parties; and a joint judgment is rendered against all of the defendants, whether upon the note or otherwise does not appear—McCoy v. Yager, 34 Mo. 134; Clark's Adm'x v. Hann. & St. Jo. R.R. Co., 36 Mo. 202-15; Doan et al. v. Holly, 25 Mo. 357.

II. The petition does not state facts sufficient to constitute a cause of action against these defendants. It is shown by the petition that the credit was not given to these defend-

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ants, but to James F. Hudgins and to his sureties and the endorsers of the note discounted by plaintiff at the several times named in the petition. See *Emly v. Lye*, 15 East. 7.

III. The first instruction given to the jury by the court submits the main question of law involved in the whole case to the jury. Whether Bayliss & Hudgins were in law to be considered borrowers of the money under the circumstances shown in the evidence, is purely a question of law to be decided by the court. To submit this question to a jury was erroneous—*Hickey v. Ryan*, 15 Mo. 62; 6 Mo. 273.

IV. The instructions asked for by the defendants ought to have been given: they contained the law applicable to the case. The question was, did the bank give credit to the firm of Wm. Hudgins & Co. in making the loan of money, or rather in discounting the note? This question was fairly presented to the jury by these instructions, and they ought to have been given—*Farmers' Bk. v. Bayless et als.*, 35 Mo. 428; *Sto. on Part.* §§ 134-42; *Jacques v. Marquand*, 6 Cow. 497; 3 Kent, 41-4; 8 Pick. 411; 9 Mass. 119-21; *Gow on Part.* 154, & *supp.* 43; *Coll. on Part.* 458, 473 et seq., where the whole matter is fully discussed.

V. The discounting of a note by the bank in renewal or in the place of the original contract and note, with different makers and endorsers from those to the original contract, was a satisfaction of said original contract and note, and released the original parties from any further obligation in reference thereto, and the jury ought to have been so instructed—*Yarnell v. Anderson*, 14 Mo. 619; *Burdick v. Gunn*, 15 Johns. 247; *Appleton v. Kennon*, 19 Mo. 639; *Arnold v. Camp*, 12 Johns. 409.

HOLMES, Judge, delivered the opinion of the court.

The case comes up by appeal from the District Court of the 5th District, in which the judgment obtained by the plaintiff in the Ray Circuit Court was reversed.

The petition must be regarded as stating a cause of action against the members of the firm of Wm. Hudgins & Co. for

money loaned to them by the plaintiff, and not as an action founded on the note. It contains but one count, and appears to have been framed with a view to maintaining the action both against the parties to the note, as upon a liability created by the instrument, and against the members of the firm, as upon a liability for money loaned to them. It is apparent that such causes of action were improperly united in the same count. This is not one of the causes of demurrer contemplated by the act concerning practice, and the error should have been corrected by a motion to strike out the surplus matters. No such motion was filed; and in such case the irrelevant matters will be treated here as surplusage. The averments concerning the note and the parties thereto, looking to the instrument as the foundation of the cause of action, will therefore be considered as merely statements of matters of evidence, which might have been omitted in the pleading.

To the cause of action founded on money loaned to the firm, the defendants Garner, Stewart and Shaw were unnecessary and improper parties. A demurrer to the petition, for this reason, was filed by the defendants Hudgins and Bayliss; but it does not appear by the record what disposition was made of it, otherwise than as it appears that these defendants afterwards had leave to answer. The demurrer should have been sustained—Gen. Stat. 1865, ch. 165, § 6. The trial proceeded against all these parties, and a verdict and judgment were rendered against them all. This error was made the ground for a motion in arrest of judgment, which was overruled. We think it should have been sustained. There can be no doubt that such a judgment is erroneous.

It was insisted by the respondents that the record shows that the motion for a new trial was filed after the motion in arrest, and was impliedly withdrawn or wholly superseded, and that therefore the case must be considered here as if no motion for a new trial had been made. We do not agree to this view of the matter. The bill of exceptions shows that the motion for a new trial was filed first, and first disposed

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of. By an entry in the record it would appear that the motion in arrest was filed first, and then the motion for a new trial afterwards, on the same day; and both motions were continued to the next term, and were finally disposed of together on the same day. It is true that the motion for a new trial comes first in the logical order of pleading, and when a motion in arrest has been made and overruled it will then be too late to file a motion for a new trial afterwards, for the motion in arrest presupposes and admits that the verdict was correct; and so it was held in *McComas v. State*, 11 Mo. 116: but where both motions are filed together and are disposed of in their logical order, as in this case, we see nothing substantial in the objection.

The principal difference between this case as presented here on the merits, and the same case as it was presented in the *Farmers' Bank v. Bayless et als.*, 35 Mo. 428, is in the form of the petition. In that case the note was declared on as the note of the firm. This suit is founded on the loan of money, which was the original consideration of the note; and the plaintiff seeks to establish by proof, that the money for which the note was given was a direct loan from the bank to this firm, and to hold the members of the firm liable upon the original consideration of the note. It was also argued, upon the theory on which the case seems to have been tried below, that they might also be held liable as parties to the instrument on the proof made that the note was executed by James F. Hudgins, the maker and one of the firm, by authority and in the name of the firm as their act, using the style of "James F. Hudgins" instead of their usual partnership name. Thus the plaintiff endeavors to avail himself of two distinct grounds of liability and two causes of action in one count. With reference to the evidence and the questions of law arising in the case, it would seem to be a matter of little importance which ground of liability was relied upon, for the evidence fails to sustain either view.

The state of the case is not materially changed, by the introduction of any new or further evidence, in this case, from

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what it was before. The law of the subject is carefully considered in the *Farmers' Bk. v. Bayless et als.*, 35 Mo. 428, and we entirely agree with the conclusions there arrived at. It is not doubted that the note might be the note of the firm by one style as well as another, if it were distinctly proved that the firm had authorized it to be drawn and negotiated in that form, and that it was the act of the firm in that name; and if it were clearly proved to have been a loan of money made to the firm, they might be liable in this action. The burden of proving these facts was on the plaintiff. On the face of the note, it would be presumed to have been the note of the individual maker, and a loan of money made to him; and this presumption must be overcome by clear evidence that it was intended to be, and was in fact, a partnership style—an act of the firm, and a loan of money to the firm—*Boyle v. Skinner*, 21 Mo. 82.

The evidence fails to show that such was the nature of this transaction; on the contrary, it is made very clearly to appear that it was drawn and negotiated as the individual note of the partner signing it in his own name, and that the money was loaned on the credit of the parties to the note, and not on the credit of the firm; such appears to have been the understanding of all parties concerned. It is conceded to be immaterial that the money, when obtained on the note, was applied to the use of the partnership; that would merely create an individual account between the partner and his firm. It is equally unimportant that the parties to the note and the members of the firm understood that the money was to be borrowed for the use of the firm, or was applied to the business of the firm, when they were all, at the same time, fully aware that the note was to be drawn and negotiated as the individual note of the maker and in his own name only; and they knew that the reason for this was, that it was supposed that the maker, being a director and a stockholder in the bank, could obtain the loan on better terms than the firm itself could do in their own name. There was really no transaction whatever between the bank and the firm. The

individual partner was not in that matter acting as the agent of the partnership but for himself ; nor is it a matter of importance that the stock, which was really owned by the firm, stood in the individual name of this partner on the books of the bank for the very purpose of giving him an individual credit with the bank. With reference to the bank, it was simply a discount of the note on the credit of the parties to the instrument. The money was doubtless paid over, according to the usage of banks, to the last endorser and by him to the maker, for whose accommodation the other parties signed the paper and for whose benefit it was discounted ; and by him, it must be supposed, the money was applied to take up the previous note, for the renewal of which the money had been borrowed. The previous note was thereby paid and extinguished, and there was an entire substitution of the new debt for the old one ; and it matters not that the previous note was the actual consideration of the new one, and so back to the first and original note on which the money was actually obtained from the bank by the maker, and when obtained applied to the uses of the partnership. Nor can the admission of the other partners, by paying interest on renewals out of the partnership funds, or by stating that the money was designed for their benefit, or that they would see the note paid, have the effect to change the nature of the transaction. Their proper meaning would be only that they would provide the individual maker with funds to meet his obligations to the bank, and carry it to his individual account with the firm. If a recovery could be had against the members of the firm, the matter would still have to be adjusted between the partners in the partnership account ; and if the endorsers on the note are obliged to pay it, they have their recourse upon the maker, for whom they are sureties, and he may have his account against his firm, to whose use he has applied the money.

These conclusions will so far determine the case that it will be unnecessary to examine the instructions in detail. It will be apparent that most of the instructions given by the court

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were erroneous : they proceeded upon a theory that was not warranted by the state of the evidence, and several of them propounded questions of law to the jury.

The instructions refused for the defendants Hudgins and Bayliss were correct enough, and should have been given.

The judgment of the District Court reversing the judgment of the Circuit Court will therefore be affirmed, and the cause is remanded to the Circuit Court. The other judges concur.



JOHN M. STROUSE, Appellant, v. WILLIAM DRENNAN *et als.*,  
Respondents.

1. *Courts—Supreme Court—District Court—Practice—Error and Appeals.*—The judgment of the District Court reversing the decision of the Circuit Court may be reviewed upon appeal or writ of error by the Supreme Court. The judgment of the District Court is a final judgment as far as that court is concerned.
2. *Administration—Guardian and Ward—Sales by Guardian—County Court—Jurisdiction.*—Under the statute relating to guardians and curators (R. C. 1845, ch. 73, p. 551, § 22), and the amendatory act of Mar. 3, 1851 (Sess. Acts, p. 217), the County Court has no jurisdiction to order the real estate of the minor to be sold for his support, but only for his proper education. Where the petition filed by the guardian and the order of sale made by the court show that the sale was made for the education as well as the support of the ward, the jurisdiction of the court will be sustained and the sale will not be held void for want of jurisdiction in the court. The act of March 3, 1851, provided that sales of lands by guardians should be advertised and conducted in the manner provided for sales of real estate of decedents by executors and administrators. Where it appeared that the sale of the ward's real estate was made by the guardian without an appraisement, and that the report of sale was confirmed at the same term at which the sale was made—*Held*, that the provisions of the statute were not complied with, and that no title passed to the purchaser at the sale by the guardian's deed. County and Probate Courts are courts of limited jurisdiction, and in sales made under their authority it must appear that the provisions of the statute have been complied with, as the same liberal intendment is not extended to their acts as to those of courts of general jurisdiction. It is the duty of a purchaser buying real estate sold by the authority of courts, to look to the order of the court and see whether there is authority to sell, and if so, what are the conditions and restrictions incident to its exercise; he must see that the terms on which the power to sell depends have been complied with; when this is done, his title will not be vitiated by anything which takes place afterwards.—Petition for rehearing filed and overruled.

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*Appeal from the Fifth District Court.*

The guardian's deed was as follows :

"Know all men by these presents, that at the adjourned term of the Probate Court of Platte county, Missouri, in the month of June, in the year 1854, I applied to said court for an order to sell the real estate of George Strouse, deceased, for the education of his minor child, which was granted ; and I, as the guardian of John M. Strouse, the only child and heir of the said deceased, in pursuance to said order of said court, sold to James M. Davis, of Platte county and State aforesaid, for and in consideration of nine hundred and twenty-five dollars to me in hand paid as guardian as aforesaid, the south-west quarter of section number twenty-three (23), in township number fifty-two (52), and range number twenty-four (24), situated in said county of Platte ; which said quarter section of land, by virtue of the power by law in me vested, and all the right, title and interest therein of the said George Strouse at the time of his death, and which has since descended to his heir, for and in consideration of the amount of money aforesaid, I have granted, bargained and sold, and by these presents do give, grant, bargain and sell unto the said James M. Davis, and unto his heirs and assigns forever : To have and hold the premises aforesaid unto the said James M. Davis, and his heirs and assigns forever, free from the heirs of the said George Strouse, deceased, and all others claiming under him. In testimony whereof, I hereunto set my hand and seal this 22d day of July, 1854. Alexander Baker, guardian. [Seal.]"

Duly acknowledged and recorded.

*Doniphan & Carroll*, for appellont.

The only point presented in the court below was that defendant's record showed a proper sale of the property sufficient to convey the fee simple title of the minor's estate. They asked such an instruction and it was refused ; but the court instructed the jury, that Baker, the guardian, had not

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fully complied with the law in selling the property. The sale was approved on the 6th day of July, 1854, the same term at which the sale was made. This makes the record show that the law was not complied with in the matter of the sale and the approval, and the sale may be attacked in a collateral proceeding—22 Mo. 310; Vallé v. Fleming et al., 19 Mo. 454; Knowlton v. Smith, 36 Mo. 513.

The plaintiff here is entitled to treat the sale as a nullity—Caldwell v. Lockridge, 9 Mo. 358, & 22 Mo. 317. This case settles the doctrine that the heir may call in question the sale in a suit by him against the purchaser. Where the administrator's sale is void, the remedy of the heir is to sue for possession—Bank v. White, 23 Mo. 342. A guardian is bound to comply with the statutory provisions affecting his duty in discharge of his trust—Finney v. State, 9 Mo. 227.

This sale was made under the act of 1851 (see p. 217), and it had to be strictly complied with—7 J. J. Marsh. 502; 6 Dana, 466; 12 Mo. 63; 7 Dana, 479. It is decided that a guardian must strictly perform his duties, but need not strictly report the same.

In this case there is no evidence of any petition filed by the guardian, or what it contained, except as recited in the order of the court; and the order of the court is defective, as it does not show the land was to be sold alone for the education of the minor, and is void—Beal v. Harmon, 38 Mo. 435. There is no pretence that the land was ever appraised; and in Robert v. Casey, 25 Mo. 585, the court say the purchaser must see that the law has been complied with until he gets a deed, but afterwards he is not responsible for the dereliction of the guardian.

As the law then stood, it was the duty of the purchaser to see that the Probate Court had ordered a sale of the land to educate the minor; that the administrator had complied with the law in such sale, and had given him such a deed as the law required. If he failed in these respects he is prejudiced thereby, and the court will not protect him in his

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own laches—25 Mo. 593 ; 21 Mo. 598. The order of the court fails to show the purpose of the sale.

In the District Court Judge Clark, in effect, decided that the sale was a bad one, but he agreed to a reversal because he says the defendants had no equity. That may be so or not, but the papers do not present such a case, and no such consideration of it is asked in the pleadings.

Judge Heron ignores all the points except the failure to appraise the property, and decides that the approval of the sale cured the defect, and relies upon the decision of the U. S. Court in *Grignon v. Astor*, 2 How. 319. This case is overruled for our purpose in 19 Mo. 461-2. He only goes upon the hypothesis that an order of approval of sale is like an order adjudging that real estate shall be sold. Previous to the act of 1851 approval of the sale was not necessary, but by that act it became necessary to report the sale at the next term thereafter, with a full report of the proceedings and including a copy of the advertisement and a certificate of the appraisement verified by affidavit. (See § 32, Stat. of 1845, p. 48.) These are positive requirements that cannot be cured by the approval, unless after the lapse of a long period of time, and when the deed showed by recital that such requirements had been complied with. Here the deed was not such as was required by law. (See Acts 1851, p. 218.) Sec. 3 and sec. 5 require that they shall be referred to in apt and appropriate language. When no deed is made, no interest can pass—*Wohlein v. Speck*, 18 Mo. 563 ; 22 Mo. 310. Then the deed does not convey the interest of the ward, and a guardian can convey none other—21 Mo. 603 ; 6 Conn. 258 ; *id.* 373, 385 ; 19 Mo. 463. The Supreme Court have decided that a deed not properly acknowledged cannot be recorded or used—38 Mo. 70. This was acknowledged before W. E. Baker, clerk, who had no power to take acknowledgments out of term time, if at all—Laws of 1851, p. 210, sec. 10.

The deed fails to recite the order of the court, the adver-

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tisement, the appraisal, the time, place or terms of the sale, and, instead of conveying the interest of the ward, it conveyed the interest of George Strouse the father, at the time of his death: he could pass no title but that of John M. Strouse at the time of making the deed—*Dickerson v. Campbell*, 32 Mo. 544.

In this case the decree of the Probate Court is not called in question collaterally. It may have been all right, and the subsequent acts of the guardian insufficient to convey title to the infant's land. An infant could not be divested of his real estate by the common law, and to divest him under the statute it must be strictly complied with, as the purchaser's title comes through that channel only—*Calvert v. Godfrey*, 6 Beav. 97; *Garniston v. Gavit*, 9 Law Jur. 78.

The court of chancery has no inherent original jurisdiction to direct the sale of infant's real estate—*Rodgers v. Dill*, 6 Hill, (N. Y.) 415. The Probate Court of Platte county had no jurisdiction—Acts of 1847, p. 27, & 1849, p. 428.

*Woodson*, for respondents.

I. For the purpose of making sale of the real estate of infants, approving the same, and determining all questions connected therewith, the Probate Court of Platte county was a court of general jurisdiction. It had jurisdiction of the subject matter of this suit, and all of its acts are valid and binding upon the parties, and most clearly cannot be questioned in a collateral proceeding—*Frye v. Kimball*, 16 Mo. 21; *Overton v. Johnson*, 17 Mo. 442; *Wohlien v. Speck*, 18 Mo. 563; 10 Pet. (U. S.) 473; 2 How. (U. S.) 319. We ask the especial attention of the court to the whole of the two last above recited cases—4 Dana, 429; 15 Ohio, 703; 16 U. S. Dig. 309; *Wolf v. Robinson*, 20 Mo. 459; 20 U. S. Dig. 442, §§ 190, 197, 205.

II. No appeal lies in this case to this or any other court. Under our statute, appeals from the inferior courts to the Supreme Court only lie upon final judgments. There was no final judgment in this case, and the appeal should be dismissed.

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WAGNER, Judge, delivered the opinion of the court.

A preliminary question is raised by the respondents' counsel as to whether this court can take cognizance of this case as it now stands. The case was appealed from the Platte Circuit Court, and on a hearing in the District Court the judgment of the Circuit Court was reversed and the cause remanded, and it is now suggested that the judgment of the District Court is not such a final determination as will authorize an appeal. The law provides that, on all final judgments rendered in the District Courts, appeals, or writs of error, may be taken to the Supreme Court. It is true the judgment of the District Court is not a complete and final disposition of the cause, putting it at rest for ever, as is contemplated, and orders further proceedings in another court; nevertheless it may be said to be final so far as the District Court is concerned, where, under a similar law, which declares that every person aggrieved by any final judgment or decision of any Circuit Court, might appeal, &c., a writ of error was sued out from a judgment of the County Court to the Circuit Court, and, upon a trial in the latter court, the judgment of the County Court was reversed and the cause remanded for a new trial. From that decision an appeal was taken to the Supreme Court, and a motion was made to dismiss the appeal on the ground that the judgment was not final; but it was held, that the law was alike applicable to both writs of error and appeals; that the decision in the Circuit Court destroyed the judgment in the court below, and, if it was erroneous, the judgment of reversal should be reversed, the effect of which would be to restore the judgment of the County Court; and that the judgment was final, from which an appeal or writ of error would well lie within the meaning of law. The motion was accordingly overruled—*Rankin v. Perry*, Adm'r, 5 Mo. 501; *Perry v. Alford*, 5 Mo. 503. This also seems to be the practice in New York, from which State our judicial system is framed and modelled. Aside from authority, upon principles of reason, we are well

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convinced that this is the correct interpretation and clear intention of the law.

A different ruling would produce great injustice and protract litigation indefinitely. By a series of reversals in the intermediate courts, and remanding the cause, the contest would become interminable, and the defeated party would be wholly deprived of the right of having his controversy settled in the court of last resort. We do not think that the law-makers contemplated such a result, or that the law will justly bear such a construction.

The case was ejectment, in the Circuit Court, for the recovery of a piece of land situate in the county of Platte. The plaintiff derived title from his father, who died seized and possessed of the premises, and the land was sold by his guardian by virtue of an order of the Probate Court. The defendants claim the real estate and resist the action under a title acquired by purchase at the guardian's sale. The sale was had under the law of 1851, which prescribes the mode in which guardians shall proceed in selling the real estate of minors, and the cause for which the court is authorized to order the same to be sold. The first section provides, that in all cases where the real estate of minors is ordered to be sold under the provision of the twenty-second section of the act of 1845, concerning guardians, curators, and minors, such sale shall be advertised and conducted in the same manner provided by law for the advertising and conducting sales of real estate of deceased persons made by executors and administrators for the payment of debts. Section second requires that whenever any guardian or curator who should sell any real estate belonging to his ward under the order of any court having competent jurisdiction, he should report such sale to the court in the same manner as executors and administrators were required by law to report sales of real estate made by them for the payment of debts, and such sale, if approved by the court, should be valid to all intents and purposes. The third section prescribes the recitals which should be contained in the deed,

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and declares that the guardians and curators, after receiving payment of the purchase money for any real estate sold by them, should make and deliver to the purchaser or purchasers thereof deeds of conveyance for the same, reciting the order of the court, the advertisement, the appraisement and description of the real estate, the time, place and terms of sale, and the payment of the purchase money—which recitals were made *prima facie* evidence of the facts so recited, and conveying to such purchaser or purchasers all the right, title and interest of the ward in the real estate sold.

The twenty-second section of the act concerning guardians and curators, R. C. 1845, to which the above recited act is amendatory, gives the County Court power to order the sale of the real estate of minors for purposes of education only. By the provisions of the law relating to the sales of real estate by executors and administrators, referred to in the act of 1851, it was made necessary that, before any sale took place, the same should be appraised by three disinterested householders of the county in which the same was situated; that it should be advertised in a certain prescribed manner, and that at the next term of the County Court after such sale the executor or administrator should make a full report of his proceedings, with the certificate of appraisement, and a copy of the advertisement, which report should be verified by affidavit, &c.; and if such report and proceedings of the executor or administrator were not approved by the County Court, the proceedings should be void, and the court might order a new sale; but if such report was approved, the sale should be valid. The record shows that the guardian petitioned the Probate Court for an order to sell the same to provide for the support and education of his ward; it is not shown that there ever was any appraisement, and the fact appears that there was none; and it also appears by the record that the guardian reported his proceedings to the Probate Court on the day on which the sale took place, and the court entered its order of approval on the same day, being of the same term. The position now as-

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sumed, and the ground relied on by the plaintiff is, that the guardian wholly failed to comply with the law, and that the sale passed no title to the purchaser. The Circuit Court found for the plaintiff on this theory, and the District Court reversed its judgment.

Courts have gone great lengths to uphold judicial sales, and where real estate has been sold by order of a court having jurisdiction, the general rule is that the title derived in consequence of such sale cannot be attacked in a merely collateral proceeding, but will be good until set aside, or divested, in a direct action for that purpose. This rule is necessary to protect innocent purchasers and give repose to titles. Our County and Probate Courts are not courts of general jurisdiction according to the common law meaning of the term in which such liberal intendments are indulged, for they have only limited jurisdiction, which is specially conferred on them by statute; but when they act in a matter in which they clearly have jurisdiction, the most liberal intendments and presumptions will be extended in support of their proceedings. The case of *Grignon's Lessee v. Astor et al.*, 2 How. 319, has gone further than any case in this country in upholding judicial sales of real estate. In that case it did not appear that the notice required by statute had been given by the administrator on the presentation of his petition for sale; but the Supreme Court said, that, after the court of original jurisdiction had passed on the subject, they would indulge the presumption that the requisite steps were taken. There a great length of time had elapsed before the proceedings were commenced to impeach the sale, and the law is always favorably inclined to support judgments when sought to be attacked and destroyed in a remote period after rendition, especially when assailed for omissions to show evidence which is not strictly required to be entered of record. But this court has not gone to the extent of the ruling in *Grignon v. Astor*, and has held, that, in sales under the statute by guardians and administrators, the acts required to be done must be complied with, and that it is the duty of the pur-

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chaser to see that the proceedings of the court and the acts of the person making the sale are in conformity to law up to the date of sale—Vallé v. Fleming, 19 Mo. 454; Robert v. Casey, 25 Mo. 584.

The petition upon which the court ordered the sale stated that it was necessary that the real estate should be sold to furnish means for the support and education of the ward. The law did not empower or authorize the court to order the sale of real estate for the support and maintenance of the minor, and this part of the prayer in the petition was void and gave no jurisdiction—Beal v. Harmon, 38 Mo. 435. But the court had the right to order the sale for purposes of education, and we should be justified in presuming that the court acted within the pale of its jurisdiction and made the order for that cause.

It here appears that no appraisement was made, and the law expressly requires, that, before the guardian shall sell any real estate, he shall have it appraised by three disinterested householders of the county where the land lies, and at the next term of the court after such sale he shall make full report of his proceedings, with the certificate of appraisement. This is an absolute requirement of the law, and it should be obeyed even if the reason of it was not plainly perceived. But it was enacted for good and substantial reasons: it furnishes evidence to enlighten the judgment of the court in the approval or rejection of the sale. The appraisers must be disinterested householders acting under the sanction of an oath; no evidence could be more satisfactory. It was the intention of the law to supply this medium of proof, and prevent the sacrifice to which the estate of minors might be exposed if courts were left to rely upon the interested representations of sharks and speculators as to value. The report was confirmed at the term at which the sale was made; in fact, on the very day of the sale. The court had no authority to proceed to act in the premises at that time, no more than a court would be to render final judgment at the return term of a writ, when the law declares that it could

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only be rendered at the second term. By postponing the time for action as to the approval or rejection of the report to the term next after the sale, an opportunity is afforded to scrutinize its fairness, and see that justice has been done to all parties ; and if the proceedings have been irregularly conducted and the property sold below its fair value, objections can be made, and the sale set aside.

To affirm the validity of the sale in this instance would be to sanction the violation of a law which is founded in justice and wise policy ; nor do we consider that the views above enunciated operate harshly on purchasers, or tend to impair the validity of titles. It is the duty of a purchaser, when he is about to buy real estate sold by authority of courts, to look to the order of the court and see whether there is authority to sell, and if so, what are the conditions and restrictions incident to its exercise. He must see that the terms, on which the power to sell depends, have been complied with ; when this is done, he will be safe in buying, and his title will not be destroyed or vitiated by anything which takes place afterwards. The deed made by the guardian to the purchaser at the sale contains none of the statutory recitals and is informal and defective ; but as the case must be reversed, for the reason given above, we need not consider its effect.

The judgment of the District Court is reversed. The other judges concur.

*Petition for Rehearing by Respondent.*

WAGNER, Judge, delivered the opinion of the court on the petition for rehearing.

The counsel for the defendants has filed his petition for a rehearing in this cause, and for a modification of the opinion previously delivered. It is not contended that the judgment is wrong, for the deed made by the guardian is admittedly defective and incapable of conveying any title ; but it is insisted that there is error in that part of the opinion which

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intimates that it is the duty of the purchaser to see that the law has been substantially complied with, and that the court having acquired jurisdiction, all its acts are to be deemed valid till reversed by appeal or writ of error in some superior tribunal. That this is correct in common law courts exercising jurisdiction according to the common law rules, will not for a moment be disputed; and our County and Probate Courts being courts of record, and established by law with certain defined powers, will have every liberality and indulgence extended to their proceedings when they act within the limits of their jurisdiction. When we see plainly that jurisdiction has attached, we shall be warranted in presuming that their judgments are correct, although an exact conformity to law does not appear in every respect; but when a non-compliance with law expressly and positively appears on the face of the record, can or ought an intendment to uphold their proceedings be indulged? This court has not gone to the extent of some courts in imparting validity to the judgments and proceedings of County Courts in guardians and administrators' sales, whilst it has been much more liberal than others. In New York it is the settled rule of decision in the courts in relation to sales made by order of their surrogates, that, before any title passes on such sales, a strict compliance with all the requirements of the law should be shown, and the courts of that State have been very vigilant and astute in detecting defects. Such a course is calculated to shake the confidence in the title acquired under such sales, and we are not inclined to follow it, but prefer to give to such sales very liberal presumption in support of their validity. But when the record in apparent and unmistakable terms shows that there has been a failure to comply with essential requisites of the law, we think it would be going entirely too far to say that we could in no case examine into the matter.

In *Frye v. Kimball*, 16 Mo. 21, Mr Justice Ryland said, *arguendo*, "We will not disturb the title to real property acquired under sales made in pursuance of the orders of the

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court, and we will not look with a scrutinizing eye into the proceedings of such courts to find defects in order to set aside sales of real estate sanctioned and ordered by such courts." The case did not call for any expression of opinion, but we do not understand the judge as holding that a deed would confer a complete title regardless of all defects that might be apparent in the record. *Overton v. Johnson*, 17 Mo. 442, merely decides that the accounts, lists, inventories, and appraisements, which the statute requires to be filed with the petition for the sale of a decedent's estate, are not necessary to give the courts jurisdiction, and that a failure to file them would not render the sale void. In this opinion we entirely concur.

In *Speck v. Wohlein* 22 Mo. 310, it was insisted that the approval of a sale could not be questioned in a collateral proceeding; but the court said, that, had the approval been made at the term required by law, there might have been some weight in the proposition; the party affected could then have taken his appeal. But the objection to the proceeding was that the approval was made when the party was not in court, and not required to be there; and the appeal had to be taken at the same term of the approval, and the party not having notice and not being present, could not take his appeal. It is true that the judge in that case did not intimate what effect an approval made under such circumstances would have if acted upon and consummated by a deed.

In *Roberts v. Casey*, 25 Mo. 584, Judge Napton, in speaking of the duties and rights of a purchaser at a guardian's sale, says that the purchaser cannot be held responsible for the acts of the guardian; but he adds, "undoubtedly where a title cannot be consummated without certain acts being done and an approval by the court of those acts, the case is different. The sales of administrators under the statute are of this character." And he says that the purchaser must look to the order of the court, and see whether there is authority to sell, and if so, how far that authority is restricted,

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and that the order on which the power to sell depends has been complied with.

The statute required that the sale should be approved at the next term after the land was sold; this was the crowning act, and till such approval took place at the proper time there could be no valid sale; and until such report and confirmation no appeal could be taken, for no notice was given, and no person was in court to act. The law on this point is well examined in *Vallé v. Fleming*.

The other judges concurring, the motion for a rehearing will be overruled.

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HENRIETTA WATKINS, Adm'x of Estate of JAMES R. ALLEN, deceased, Defendant in Error, v. THE TRUSTEES OF THE RICHMOND COLLEGE, Plaintiffs in Error.

*Contract—Action—Voluntary Assumpsit.*—No action can be maintained for moneys expended or for services rendered to the defendant, except in pursuance of a contract express or implied between the parties. No person can make another his debtor without the consent of the party benefitted; there must be a previous request express or implied, or an assent or sanction given after the money is paid or the act done.

*Error to Fifth District Court.*

The cause was submitted to the court without a jury. The plaintiff moved the court to declare the law as follows:

1. If, from the evidence given to the court in this case sitting as a jury, the court should find that James R. Allen, the plaintiff's intestate, did have the college building completed for defendants, and did pay and lay out the amount of money in plaintiff's petition mentioned for that purpose, and that, during the carrying on of the work necessary to the completion of said building, the said defendants were fully apprised thereof, and knowingly permitted the said James R. Allen to go on and complete said college building without interfering to prevent him from so doing, and after the completion thereof the defendants used said building for educational

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purposes, although said Allen may have commenced the work without the order of the defendants and without any express contract in relation to the work, yet the law raises an implied promise on the part of the defendants to pay the value of such services.

2. If the court find from the evidence the facts to be as hypothecated in the first instruction above as a legal inference drawn from the circumstances of the case, a promise to pay may be implied, as also may a request to do such work be implied.

3. In this case, the plaintiff avers in his petition that he did have the college building completed for defendants; defendants' answer does not deny this specific and positive facts; it is therefore admitted. By the pleadings it is also admitted that it was the duty of the defendants to have the college building completed: this is averred by plaintiff and not denied by defendants. The performance and fulfilment by the plaintiff's intestate of a duty incumbent on the defendants to be performed, and which performance was accepted afterwards by defendants. Then if, from the evidence and admissions by the pleadings in this case, the court should find that the performance of the aforesaid duty was beneficial to defendants and expensive to plaintiff's intestate, the law raises an implied request by defendants, and an implied promise to pay for services attending such performance if the defendants had knowledge of the fact of plaintiff's intestate being engaged in performing such duty so incumbent on defendants, and the court will find for the plaintiff.

4. From the admissions of the parties by the pleadings in this case, especially when such admissions are corroborated by the testimony in the case, the plaintiff is entitled to recover.

The court refused to give said instructions, and the plaintiff excepted.

The defendants asked the following declarations of law, which the court also refused to give:

1. That unless the defendants requested James R. Allen, the original plaintiff, to do the work on the college building specified in the amended petition, or promised to pay him for said work, the finding must be for the defendants.

2. If the work specified in the amended petition was done by James R. Allen, the original plaintiff, voluntarily, without any request from defendants to do the work and without any promise by the defendants to pay him for the work, the finding must be for the defendants.

3. The original plaintiff could not make himself the creditor of the defendants by doing work on the college building without any contract express or implied with the defendants.

The court, of its own motion, gave the following instructions :—

1. If it appear to the court sitting as a jury, from the evidence, that there was a contract subsisting between the deceased, James R. Allen, and defendants; and if it further appear from the evidence that, in pursuance of said contract, said deceased put valuable improvements upon the Richmond College building, the finding should be for the plaintiff in the value of such improvements. A contract may be either express or implied; and if it appear to the court sitting as a jury, from the evidence, that deceased put valuable improvements upon the college building, and that defendants knew that said improvements were being made, an implied contract on the part of the defendants to pay for the improvements is raised by the proof of such knowledge, and the finding should be for the plaintiff if there is no affirmative proof that the deceased undertook and performed the improvements as a gift or upon other considerations than those arising upon contract.

2. If it appear to the court sitting as a jury, from the evidence, that deceased made valuable improvements upon the Richmond College building, and that there was no contract express or implied between deceased and the defendants touching said improvements, then such improvements should

be treated as a gift from deceased to the college. If it appear that defendants *bona fide* refused to contract with deceased respecting said improvements, but that nevertheless deceased made the improvements upon other considerations than those arising upon the contract, then, as concerning these defendants, the improvements should be treated as a gift, and the finding should be for the defendants.

3. If it appear to the court sitting as a jury, from the evidence, that defendants refused to contract with deceased respecting improvements on the college building, and it further appears from the evidence that nevertheless the deceased, James R. Allen, put valuable improvements upon said college building with the expectation that he would be reimbursed by public contribution after that he (deceased) had completed the improvements, and had thereby placed defendants in condition to enforce a contract for the endowment of the college, then such improvements must be treated as a gift, so far as the defendants are concerned, and the finding must be for defendants.

4. By the pleadings in this case, this is an action upon contract to hold defendants upon a promise express or implied to pay for certain valuable improvements stated to have been made upon the Richmond College building, and this is not an action of any other form.

To the giving of said instructions the plaintiff excepted.

*Hall & Oliver*, for plaintiff in error.

I. The court committed no error in refusing instructions asked by plaintiff. They ignore the defence set up by the answer and sustained by the evidence—*Sawyer v. Han. & St. Jo. R.R. Co.*, 37 Mo. 240.

II. The instructions given by the court were at least as favorable to plaintiff as the law is—*Coleman v. Roberts*, 1 Mo. 68; *Morris v. Barnes*, 35 Mo. 412.

The plaintiff had no right to make defendants his debtors against their will. His completion of the college building was voluntary and without any contracts on the part of de-

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fendants, express or implied—Whiting v. Sullivan, 7. Mass. 108; Jewett v. Stewart, 1 Me. 117; Lynch v. Bogy, 19 Mo. 171; 2 Greenl. Ev. § 107; Allen v. Mulledy, 21 Ills. 76.

*H. M. & A. H. Vories*, for defendants in error.

A gift is never implied or made out by a doubtful inference, but it must be proven to have been fully executed, and each of the parties must have so understood it and have assented thereto—2 Kent. 588; 1 Pars. Cont. 234.

The evidence in this case shows no such mutual understanding or assent of the parties. There must have been a complete executed gift at the time. A mere promise to give, or that one expects to give or donate a thing, is no gift; but, on the contrary, rebuts the fact that a gift has been made—Huntington v. Gillmore, 14 Barb. 243; Hunter v. Hunter, 19 Barb. 637; 7 Coms. 261.

FAGG, Judge, delivered the opinion of the court.

It is shown by the record that this suit was instituted in the Ray Circuit Court, to recover a sum of money alleged to have been advanced by James R. Allen in his lifetime, for the completion of the college edifice at the city of Richmond. A trial was had before the court sitting as a jury, which resulted in a verdict and judgment for the defendants. The judgment was reversed upon an appeal taken to the 5th District Court, and the case is now brought here upon a writ of error.

A careful examination of the record, we think, limits this court to the consideration of only one question. All of the declarations of law asked by both plaintiff and defendants were refused by the court; and upon its own motion the law of the case was declared in a series of instructions drawn by the judge himself. These declarations of law constitute the chief grounds of complaint against the action of the Circuit Court; and it is necessary that the evidence in the cause should be carefully examined for the purpose of determining their correctness. It is not claimed that this was anything

more than an action upon an implied promise by the trustees of the college to repay to Allen the actual amount of money alleged to have been paid by him to their use. There was no averment of an express contract in the petition. The answer denied the existence of any contract between the parties, and averred that the services of Allen were voluntarily rendered, and the money expended by him intended as a donation to the college. The issue presented by the pleadings was so simple in its character, and the facts disclosed in the testimony within such a narrow compass, as to make the application of the law a matter of no difficulty.

It may be said generally of the instructions that they contain much matter of an objectionable character. The first being hypothecated upon a state of facts not warranted by the evidence in the cause (if taken by itself), would be clearly improper; when, however, it is considered in connection with the others, we cannot say there is such an error as will require this court to interfere with the verdict.

The second and third instructions present in terms sufficiently explicit the true issue in the case; and the three taken together could not possibly prejudice the plaintiff. The matter to be determined was really whether the acts of Allen were to be taken as a voluntary contribution of his services to the college, or whether there was sufficient in the transaction, as a whole, to raise an implied promise on the part of the corporation to repay him the money which he had expended for their use.

This is a question of fact determined by the court. We are not at liberty to weigh the evidence for the purpose of deciding whether its finding was correct or not. It is only necessary to ascertain whether there was sufficient evidence to sustain the verdict; and if that sufficiently appears, it is not the province of this court to disturb it.

The principal, and, indeed it might almost be said, the only witness, discloses a state of facts that might have authorized a jury to find either way. So much was left to mere inference that different persons might very well come

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to opposite conclusions as to what was really the intention of the parties ; and this court ought not to interfere in such a case. If any hardship has resulted to the estate of Allen, there is no power in this court, from the case presented here, to relieve against it.

The other judges concurring, the judgment of the District Court will be reversed.

WAGNER, Judge. The question is whether the work and labor was performed and the materials furnished under such circumstances as would amount to an implied contract, in law, by which the plaintiff could maintain his action ; or whether it was understood at the time the work was done, between the parties, that it was a mere gratuity.

No person can by officious intermeddling cast a liability on another, and an obligation will not generally be imposed unless there has been a previous request moving from the obligor and enuring to the obligee. But where a party derives a benefit from the consideration, or the act done is beneficial, his subsequent express promise will be binding ; and even his subsequent assent will be sufficient evidence from which the jury will be authorized in finding a previous request, and he will accordingly be bound—*Osborne v. Rogers*, 1 (Wms.) Saund. 264, note 1. It is not necessary in all cases for the plaintiff to prove an express assent of the defendant to enable the jury to find a previous request ; they may infer it from his knowledge of the plaintiff's acts, or his silent acquiescence—*Doty v. Wilson*, 14 Johns. 378, 382 ; *Metcalf's Yelv.* 41, note 1. And sometimes the jury will be warranted in inferring a previous request, even contrary to the actual fact, on the ground of legal obligation alone ; as in a case where an action was brought against the husband for the funeral expenses of his wife, he having been beyond the seas at the time of her burial ; or against executors for the funeral expenses of the testator, for which they had neglected to give orders—*Jenkins v. Tucker*, 1 H. Bl. 90 ; *Tugwell v. Heyman*, 3 Campb. 298 ; 10 Pick. 156.

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But the law will not ordinarily imply a promise against the express declarations of the party—Whiting v. Sullivan, 7 Mass. 107. Nor can a plaintiff recover compensation for merely voluntary services bestowed under no employment from the defendant, unless there has been an express or implied promise to pay therefor—Lynch v. Bogy, 19 Mo. 170. So too, as a general proposition, no man can make himself the creditor of another by any act of his own unsolicited and purely officious. There must be a previous authorization either express or implied, or an assent or sanction given after the money is paid or the act done. If a plaintiff volunteers a payment on account of a defendant without any authority or request express or implied, the defendant is not obliged to reimburse him—Renns. Glass Factory v. Reid, 5 Cow. 603; Bailey v. Gibbs, 9 Mo. 44; Jones v. Wilson, 3 Johns. 434; Beach v. Vandenburg, 10 Johns. 361; Stokes v. Lewis, 1 T. R. 20; Child v. Morley, 8 T. R. 613; Winsor v. Savage, 9 Metc. 347; Young v. Dibblell, 7 Humph. 290; Lewis v. Lewis, 3 Strobl. 530. And where a party voluntarily does an act, or renders service, and there was no intention at the time that he should charge therefor, or understanding that the other should pay, he will not be permitted to recover, for that which was originally intended as a gratuity cannot be subsequently turned into a charge—Fitch v. Peckham, 7 Vt. 150; Gore v. Summersall, 5 Mon. 513. And whether it was intended as a gratuity, is a question of fact.

The committee appointed for finishing the college expressly refused to accede to Allen's proposition for doing the necessary work to complete the building, nor is there anything to show that there was ever any act or assent by which a contract could be implied. Allen was strangely reticent in regard to the whole matter; and that it was the understanding of those under whose auspices the college was erected, that he was doing the work as a donation, there can be little doubt. The Circuit Court found as a fact that he expended his work and labor as a voluntary gift to help along a public institution struggling into existence amid pecuniary embar-

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rassments. The evidence sustains the finding; and even were it weaker on this point, we could not interfere when there had been no misdirection as to the law.

I am of the opinion that the judgment of the District Court should be reversed, and the judgment of the Circuit Court affirmed.

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THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appel-  
lant, v. LEWIS SMITH, Respondent.

1. *Lands and Land Titles—Railroad Corporations—Evidence.*—Under the act of Congress of June 10, 1852, granting lands to the State of Missouri for the construction of the roads therein named, and the statute of the State of September 20, 1852, transferring such grant to the Hannibal and St. Joseph Railroad Company, no title to the *even* numbered sections within six miles of the road passed to the corporation until the plats of the location of the roads were filed in the office of the Secretary of State, and in the offices of the recorders of deeds in the counties in which the lands were located, as required by the statute of the State approved Sept. 20, 1852, § 7—see *Baker v. Gee*, 1 Wal. (U. S.) 338; *Pacific R.R. v. Lindell's Heirs*, 39 Mo. 329.—The act of Congress of June 10, 1852, made no provision for any kind of documentary evidence to be issued by the General Land Office, by which the location, boundaries and identity of the particular tracts granted within the six-mile limit were to be designated and proved; the public sectional surveys showing the even numbered sections within the six-mile limit, although admissible in evidence, are insufficient for that purpose. The certified list under the act of Congress of August 3, 1854, is evidence to show what lands passed by the grant; but if the lands embraced in such lists are not of the character contemplated by the act of Congress, or are not such as were intended to be granted thereby, then such certified lists can have no effect as evidence.
2. *Lands and Land Titles—Swamp Lands—Railroad Corporations—Evidence—Reservation.*—The act of Congress of September 28, 1850, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," operated as a reservation upon the grant of lands made to the State of Missouri for the construction of the railroads described in the act of Congress of June 10, 1852; and in a suit of ejectment brought by the railroad corporation claiming title to lands under said act of June 10, 1852, parol evidence is admissible to prove that the land sued for was "swamp and overflowed lands, made thereby unfit for cultivation," so as to bring such land within the terms of the grant or reservation made by the act of September 28, 1850, although the lists and plats to be made by the Secretary of the In-

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terior, provided for in said act, had not been made and transmitted to the Governor, nor patents issued. Such parol evidence is not admissible to prove title in defendant, but is admissible for the purpose of rebutting and invalidating the effect of the lists issued under the act of Congress of June 10, 1852, and August 3, 1854.

*Appeal from Macon Circuit Court.*

Ejectment for the N.W.  $\frac{1}{4}$  of the N.W.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of the N.W.  $\frac{1}{4}$ , and the N.E.  $\frac{1}{4}$  of the S.W.  $\frac{1}{4}$  of section 20, in township 58, and range 16, situate in Macon county in the State of Missouri. Entry laid October 2, 1855.

The respondent in his answer denied that appellant was entitled to the possession of said premises at the time alleged, or at any time since or prior thereto; and denied that he unlawfully withheld the possession thereof.

At the February term, 1866, the case was tried by the court sitting as a jury.

The appellant, to show title in itself, read in evidence—

*First.* An act of Congress entitled "An Act granting the right of way to the State of Missouri, and a portion of the Public Lands, to aid in the construction of certain Railroads in said State," approved June 10, 1852.

By the 1st section the right of way is "granted to the State of Missouri for the construction of railroads from the town of Hannibal to the town of St. Joseph in said State, and from the city of St. Louis to such point on the western boundary of said State as may be designated by the authority of said State"; "and a copy of the location of said roads, made under the direction of the Legislature, shall be forwarded to the proper local land offices respectively, and to the General Land Office at Washington City, within ninety days after the completion of the same, to be recorded."

"§ 2. And be it further enacted, That there be, and is hereby granted to the State of Missouri, for the purpose of aiding in making the railroads aforesaid, every alternate section of land designated by *even* numbers, for six sections in width on each side of said road; but in case it shall appear

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that the United States have, when the line or route of said roads or either of them shall be definitely fixed by the authority aforesaid, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid; which lands, thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by even numbers as aforesaid, and appropriated as aforesaid, shall be held by the State of Missouri for the use and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than fifteen miles from the line of the road in each case: Provided further, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: And provided further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of the said railroads through such reserved lands, in which case the right of way only shall be granted."

"§ 4. And be it further enacted, That the said lands hereby granted to the said State shall be subject to the disposal of the Legislature thereof for the purposes aforesaid and no other; and the said railroads shall be and remain public highways for the use of the Government of the United

States, free from toll or other charge upon the transportation of any property or troops of the United States."

Sec. 5 provides "that the lands thereby granted to the State shall be disposed of" only in a certain manner.

*Second.* An act of the General Assembly, approved September 20, 1852.

"§ 1. That all that portion of the lands granted to this State by the act of Congress entitled 'An Act granting the right of way to the State of Missouri, and a portion of the Public Lands, to aid in the construction of certain Railroads in said State,' approved June 10, 1852, so far as the same are applicable to the construction of a railroad from the town of Hannibal to the town of St. Joseph in this State, and which may be selected or located in conformity with its provisions, together with all the rights and privileges thereto belonging, or in said act granted, shall vest in full and complete title in the Hannibal and St. Joseph Railroad Company, for the uses and purposes, and subject to the conditions, reversion and provisions set forth and contained in said act of Congress."

*Third.* A copy of the resolution of the board of directors of the Hannibal and St. Joseph Railroad Company, adopted on the 7th day of March, 1853, accepting the grant of land made to the State of Missouri by the Congress of the United States to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Hannibal and St. Joseph railroad, as prescribed by the 4th section of the act of September 20, 1852, and filed in the office of the Secretary of State on the 17th March, 1853, duly certified by the Secretary of State.

*Fourth.* An exemplified copy of the map of the definite location and route of the Hannibal and St. Joseph railroad from the city of Hannibal to the city of St. Joseph, Missouri, with a line on the same denoting the line of said railroad, with lines and figures on the same denoting the sections, townships and ranges—filed in the General Land Office at Washington, June 10, 1853.

"General Land Office, September 19, 1860.—I, Joseph S.

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Wilson, Commissioner of the General Land Office, do hereby certify that the annexed transcript map and certificate, except the red shaded lines thereon, is a true and literal exemplification of the map on the files of this office."

*Fifth.* Evidence showing that the Hannibal and St. Joseph railroad was completed in the latter part of February, 1859, and that the land in controversy lies between three and four miles from said railroad.

*Sixth.* A list of lands certified November 18, 1854, to the Hannibal and St. Joseph Railroad Company by the Commissioner of the General Land Office, to which is prefixed the following caption:

"Hannibal and St. Joseph Railroad.—A list of vacant lands situate in the Palmyra, Milan and Plattsburgh Districts, State of Missouri, in the sections bearing even numbers, within six miles of the route of the Hannibal and St. Joseph railroad, accruing to said State in virtue of the grant made by the act of Congress approved June 10, 1852, as more particularly set forth in the general certificate hereto appended, to-wit: The N.W.  $\frac{1}{4}$  of the N.W.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of the N.W.  $\frac{1}{4}$ , and the N.E.  $\frac{1}{4}$  of the S.W.  $\frac{1}{4}$ , all in section 20, township 58, range 16.

No evidence was presented showing that the plaintiff had filed a map of the location of the road through Macon county in the office of the county recorder, as required by sec. 7 of act of September 20, 1852.

The respondent, to show title in himself, read in evidence:

*First.* The act of Congress entitled "An Act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits," approved September 28, 1850.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold

at the passage of this act, shall be, and the same are hereby, granted to said State.

"Sec. 2. And be it further enacted, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas, and, at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof: Provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Sec. 3. And be it further enacted, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Sec. 4. And be it further enacted, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated.

"Approved, September 28, 1850."

[9 U. S. Stat. at Large, 519.]

*Second.* The 1st, 2d, 3d and 4th sections of the act of the General Assembly of the State of Missouri entitled "An Act donating certain swamp and overflowed lands to the Counties in which they lie," approved December 13, 1855, the 1st and 2d sections of which are taken from the act of the General Assembly of the State of Missouri, entitled "An Act donating certain swamp and overflowed lands to the Counties in which they lie," approved March 3, 1851.

*Third.* A certificate of purchase of the land in controversy

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from the sheriff of Macon county, Mo., to Isaac Millsaps, assigned to the respondent on the 13th April, 1857.

*Fourth.* An order from the County Court of Macon county, Mo., made on the 4th May, 1852, appointing Joseph D. Butler commissioner to select the swamp and overflowed lands in said county, according to the act or acts of the Legislature donating the same.

*Fifth.* The report of said Butler, as commissioner, to the County Court of Macon county, of the lands selected by him, "that are subject to overflow and inundation during the seeding, growing and harvesting season, and have frequent standing lakes and ponds, and the Chariton meanders through, and are unfit for cultivation without embankment or artificial drainage," made on the 7th of February, 1853, and embracing the land in controversy, and an order of said County Court that said report be received.

*Sixth.* An order of said County Court, made on the 5th of September, 1855, requiring the sheriff to offer the lands selected as "swamp and overflowed" for sale to the highest bidder on the first Monday in November, 1855, except those upon which actual settlement or cultivation existed on the 1st day of September, 1855. (The respondent's assignor coming within the exception, was allowed to purchase at private sale by complying with the terms of said order.)

The respondent then offered to prove by witnesses that said land was swamp and overflowed.

The appellant objected to the introduction of any and all testimony in regard to the character of the land in controversy, as to whether it was swamp or overflowed land in 1850, and prior and subsequent thereto; which objection was overruled, and to which the appellant excepted.

The testimony tended to show that the land in controversy lies from two-thirds to a mile on the west side of Chariton river; that a "wet weather creek" (whose banks were higher than the adjacent land), heading in the bluffs about four miles north of said land, runs through it; that it overflows

contiguous lands during great and sudden rains ; that it falls almost as rapidly as it rises, running down in three or four hours after it ceases raining ; that in dry weather it ceases to flow ; that the water from the Chariton only overflowed about one-fourth of the land when there was a great flood, which appears to have occurred every few years ; that 18 or 20 acres of this land had been in cultivation since 1854, producing good crops of corn and tobacco ; that respondent built a dwelling-house upon it, which two scientific, practical engineers, after careful surveys and levellings, pronounced to be 12 feet above the highest rise ever known in the Chariton by the oldest inhabitant ; one of whom, Mr. F. R. Lockling, had had considerable experience in surveying swamp and overflowed lands in the State of Arkansas, and who gave it as his opinion that the land in controversy was neither swamp nor overflowed land : — “The lands selected there (i. e. in Arkansas) as swamp lands were of a different character from the land in controversy ; they were marshy, and water stood on them the year round ; and it was necessary, in order to cultivate them, to resort to levees and drainage.” That the greater portion of each legal subdivision was capable of cultivation ; that said land had never been reclaimed by artificial means, such as drainage or levees ; that the land has sufficient fall to carry the water off rapidly ; that it does not stand upon it, nor was any of it wet except a small portion on the S.W. corner of the N.E.  $\frac{1}{4}$  of N.W.  $\frac{1}{4}$  during the wet season ; that prior to 1850 the land had been wetter, more rain fell, more land was inundated, and Chariton river and Panther creek rose higher and spread wider than since that period.

The appellant asked the court to make the following declarations of law :

1. Under the act of Congress entitled “An Act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their limits,” approved September 28, 1850, the title to the land in controversy could not be divested out of

the United States until an accurate list and plat of said lands had been made out by the Secretary of the Interior and the same transmitted to the Governor of this State, and at the request of said Governor said Secretary had caused a patent to be issued to the State therefor in pursuance of the second section of the act aforesaid.

2. If the court believe from the evidence that the said land is a part of the lands granted to the State of Missouri by the act of Congress entitled "An Act granting the right of way to the State of Missouri, and a portion of the Public Lands to aid in the construction of certain Railroads in said State," approved June 10, 1852, and by the act of the Legislature of the State of Missouri, granting lands to the Hannibal and St. Joseph Railroad Company, entitled "An Act to accept a grant of land made to the State of Missouri, by an Act of the Congress of the United States, to aid in the construction of certain Railroads in this State, and to apply a portion thereof to the Hannibal and St. Joseph Railroad," approved September 20, 1852, and that the plaintiff accepted said act and all grants therein contained by a resolution of its board of directors on the 7th day of March, 1853, and that a copy of said resolution was filed in the office of the Secretary of State as prescribed by the 4th section of the last mentioned act, and that a copy of the location of the plaintiff's railroad was made and accepted by plaintiff's president and chief engineer, under the corporate seal of the plaintiff, and forwarded and filed in the office of the Commissioner of the General Land Office on the 10th day of June, 1853, as prescribed by the 1st section of the act of Congress and the 2d section of the act of the Missouri Legislature aforesaid, and that said land is within six miles of the plaintiff's railroad as located, and that said railroad was completed in 1859; and if the court further believe from the evidence that said several acts mentioned in this instruction had been done prior to the issuing of a patent to the State of Missouri for said lands as laid down in the first instruction, then the title to said lands is vested in the plaintiff, and the court will find for the plaintiff.

3. Under the act of Congress entitled "An Act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their limits," approved September 28, 1850, the title to said land could not be divested out of the United States until evidence had been filed with the Commissioner of the General Land Office showing it to be swamp or overflowed land within the purview of said act, and a patent issued therefor, or, after the filing of said evidence, until the passage of the act of Congress of the 3d of March, 1857, confirming the title thereto in the State, without any patent; and if the court believe from the evidence that the plaintiff had complied with and performed the several acts on its part specified in the act of Congress entitled "An Act granting the right of way to the State of Missouri, and a portion of the Public Lands to aid in the construction of certain Railroads in said State," approved June 10, 1852, and of the act of the Legislature of the State of Missouri entitled "An Act to accept a grant of land made to the State of Missouri by the Congress of the United States to aid in the construction of certain Railroads in this State, and apply a portion thereof to the Hannibal and St. Joseph Railroad," approved September 20, 1852, and said land lies within six miles of the plaintiff's railroad as located, and said railroad was located prior to the institution of this suit, and prior to the issuing of said patent, or filing the evidence in the office of the Commissioner of the General Land Office as aforesaid, and prior to the passage of said act of Congress confirming the title to said land to the State, then the title thereto vested in the plaintiff, and the court will so find.

4. If the court believe from the evidence that said land is a part of the land granted to the State of Missouri by the act of Congress, as aforesaid, approved June 10, 1852, and by the act of the Legislature of the State of Missouri, as aforesaid, approved September 20, 1852, and that said land lies within six miles of plaintiff's railroad as located, and said railroad was completed prior to the institution of this suit, then the court will find for plaintiff.

5. To constitute land overflowed within the purview of the law, the same must be overflowed during the planting, cultivating and growing season, in each year, so as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

6. To constitute land swamp within the purview of the law, the same must be so wet and marshy during the planting, cultivating and growing season, in each year, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

7. To constitute land overflowed within the purview of the law, the same must be so overflowed during the planting, cultivating and growing season, during a majority of years, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

8. To constitute land swamp within the purview of the law, the same must be so wet and marshy during the planting, growing and cultivating season, in a majority of years, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

9. If the court believe from the evidence that said land is neither swamp nor overflowed land as defined in instructions numbered 5 and 6, it will find for plaintiff.

10. If the court believe from the evidence that said land is neither swamp nor overflowed as defined in instructions numbered 7 and 8, it will find for the plaintiff.

The court gave those numbered 4, 7, 8 and 10, but the remainder of said declarations it refused to make; to which refusal the appellant excepted.

The respondent then asked the court to make the following declarations of law :

1. If the lands sued for were on the 28th day of September, 1850, swamp or overflowed lands, and thereby rendered unfit for cultivation, then the act of Congress of that date was a present absolute grant thereof to the State of Missouri, and were by the act of the Legislature of 1851 conveyed to Macon County, and the plaintiff has no title thereto.

2. The State of Missouri having conveyed to Macon County the swamp lands therein, and having conveyed subsequently to the Hannibal and St. Joseph Railroad Company lands granted by Congress to the State for railroad purposes, that even though the act of Congress granting swamp lands to the State of Missouri was a conditional grant, yet the absolute grant of said lands by the State to the counties is a qualification and limitation of the grant to the railroad company, and the grant to the railroad company from Missouri was made subject to the previous grant by Missouri of the swamp lands.

3. The act of Congress granting railroad lands was made subject to the act granting swamp lands to the State, and swamp lands were not included in the grant of lands for railroad purposes.

Which the court made, and appellant excepted.

The court found and rendered judgment for the respondent.

The appellant filed a motion for a new trial; which the court overruled, and appellant excepted.

*Hall & Oliver*, for appellant.

I. The declarations of law asked by plaintiff and refused by the court should have been given. The act of Congress of September 28, 1850 (9 U. S. Stat. at Large, 519), granting the swamp and overflowed lands to the States, does not set apart any particular tracts of land and separate them from the public domain. The States might, no doubt, very properly employ agents to select said lands; but the selections, when made, did not *ipso facto* separate the land so selected from the public domain. Nothing in the act defines the officers who are charged with the duty of executing the land laws, or their control over selections made by the States in order to see that they are made by legal subdivisions; that the greater part of each tract selected is unfit for cultivation by being wet and overflowed; that they have not been sold by the United States, nor granted to railroads, nor covered

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by pre-emption rights, &c. On the contrary, the act expressly imposes on the Secretary of the Interior the duty of supervising the selections, and it is only on his approval and the issuing of a patent that the final severance from the public domain of the lands so selected takes effect and the title vests in the State—*Rice v. Railroad Co.*, 1 Black, 358; *Foley v. Harrison*, 15 How. 433; *Baker v. Gee*, 1 Wall. 336; *Wilkinson v. Leland et al.*, 2 Pet. 661; *State v. Comm'rs*, 9 Wis. 236; *Hann. & St. Jo. R.R. Co. v. Moore*, 37 Mo. 338; *Pacific R.R. v. Lindell's Heirs*, 40 Mo. 359; vol. 1, part 1, Exec. Doc. 2d Sess. 32d Cong. (1852-53) p. 74; *Lessieur v. Price*, 12 How. 60; *Gentry Co. v. Black*, 32 Mo. 542; *Allison v. Half-ace*, 11 Iowa, 450; *Mars v. Hamilton*, 11 La. An. 774.

II. There never has been a selection of land in suit as swamp land. The report of commissioners of Macon County is not such a selection as is contemplated by the law.

III. The swamp act of September 28, 1850, has received a settled construction by Congress, by the General Land Office, and by the Legislature of Missouri, adverse to defendant's title—Exec. Doc. 1st Sess. 32d Cong. (1851-52), vol. 2, pt. 3, p. 18; Cong. Globe, vol. 26, pp. 613-15, and vol. 30, pp. 966-7, 988, 990; 10 U. S. Stat. 634; 11 id. 251; Laws of Mo. 1850-1, pp. 236, 238; id. 1865, p. 130.

IV. The evidence shows that plaintiff did everything required by the act of June 10, 1852 (10 U. S. Stat. 8), to give it title to the land in suit before this action was commenced. The plaintiff, therefore, has the legal title under a grant from the United States, and must prevail in this action even though it should be admitted that defendant has an equitable title—17 Mo. 31; 13 Pet. 437; id. 498; 2 How. 344; 10 U. S. Stat. 346.

*Carr*, for appellant.

The appellant makes the following points on this record:

I. The title to public land can only be divested out of the United States by patent, grant, or confirmation.

The title to the public lands being originally vested in the United States, the primary disposal of the soil was left to the discretion of Congress—Hill v. Miller, 36 Mo. 190 ; Lewis v. Lewis, 9 Mo. 183.

II. Whilst the title to public land is in the United States, it may be transferred to any person or persons, corporation, or State, and for any purpose the Government of the United States in its wisdom may deem expedient, regardless of any prior inchoate or equitable right of any other person or persons, corporation, or State.

Under the act of Congress, title to public lands can only be acquired in one of three ways.

*First.* By *patent* issued to the purchaser by the Commissioner of the General Land Office, in pursuance of some act of Congress. This is the usual and ordinary way of acquiring title from the United States.

*Second.* By *grant* contained in some act of Congress, as by the 6th section of the act of Congress of the 6th of March, 1820, providing for the admission of Missouri into the Union, whereby the sixteenth section of land in every township is "granted to the State for the use of the inhabitants of such township for the use of schools"; "all salt springs, not exceeding twelve in number, with six sections of lands adjoining to each, shall be granted to said State"; "four entire sections of land be, and the same are hereby, granted to the said State for the purpose of fixing their seat of government thereon"; that "thirty-six sections, or one entire township, which shall be designated by the President of the United States, together with the other lands heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the Legislature of said State, to be appropriated solely for the use of such seminary by the Legislature"—3 U. S. Stat. 547.

*Third.* By *confirmation*, which is defined by Ld. Coke to be "a conveyance of an estate or right in *esse*, whereby a voidable estate is made sure and unavoidable, or where a particular estate is increased"; "a contract by which that

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which was voidable is made firm and unavoidable—Bouv. Law Dic., tit. Confirmation. Numerous acts of this kind may be found in the U. S. Stat. at Large. See particularly the act of Congress of July 4, 1836 (5 U. S. Stat. 126), confirming certain Spanish claims therein mentioned. Acts of confirmation are applied to inchoate or equitable titles. If the title were good, there would be no necessity for an act of Congress confirming it. The very word imports, *ex vi termini*, that the estate or right in the land is voidable, and hence the necessity of an act of Congress to confirm it, to make it sure and unavoidable.

The respondent has totally failed to show any title to said land in any one of the three ways by which title can be acquired from the United States. It follows, then, he has no legal title. The act under which the respondent claims being prior in point of time to the act under which the appellant claims, has he thereby acquired such an inchoate or equitable title as to amount to an appropriation of said land before the passage of the act of Congress of June 10, 1852, so as to prevent the title from vesting under said act? It is affirmed that he has not. The State of Missouri is not a *bona fide* purchaser for value of said land, so as to place the Government of the United States under either a legal or moral obligation to grant or confirm it. The State neither paid, nor agreed to pay, anything for it. It was a mere bounty, which the Government of the United States could grant or withhold at pleasure. The State then is a mere volunteer, and as such not entitled to any aid from the courts. It has no claim which a court of equity would enforce. The respondent, claiming under the State, occupies no better position than the State.

So long, then, as the title to said land remained in the United States, and it had the power to grant or withhold the title at pleasure, it may be conceded that said land was swamp and overflowed on the 28th of September, 1850, and still the respondent's claim thereto is not any better. The State had no right or claim to said land only as it brought itself within the provisions of the act of September 28, 1850:

it failed to bring itself within those provisions, so as to entitle itself to the bounty thus generously offered to it, until it was too late; and it was too late after the passage of the act of the 10th June, 1852. The title of said land being in the Government of the United States at the passage of said act, passed out of it *proprio vigore* and unconditionally, by the provisions of said act, "to the State of Missouri, for the purpose of aiding in making the railroads aforesaid." It follows, then, that the title to the land in controversy was in the United States until it was divested in one of the three ways above stated—*Wilcox v. Jackson*, 13 Pet. 498; *Grignon's Lessee v. Astor*, 2 How. 319; *Stoddard v. Chambers*, 3 How. 285.

It has been shown that the title to swamp and overflowed lands did not pass to the State *proprio vigore* and unconditionally by the act of Congress of September 28, 1850, for want of words of present grant—*Wilcox v. Jackson*, 13 Pet. 498; 1 Black, 358. The converse of that proposition is true under the act of Congress of June 10, 1852, because that act uses words of present grant—*Kennett v. Cole Co. Court*, 13 Mo. 139; *Lessieur v. Price*, 12 Mo. 14; *Hann. & St. Jo. R.R. Co. v. Moore*, 37 Mo. 338; *Lucas v. Strother*, 12 Pet. 454; *Ham v. State*, 19 Mo. 602; S. C. 18 How. 126; *Doe v. Eslava*, 9 How. 446; *Lessieur v. Price*, 12 How. 60; *Wilcox v. Jackson*, 13 Pet. 498; *State ex rel. Parsons v. Comm'rs*, 9 Wis. 231.

III. The title to swamp and overflowed lands under the act of Congress of September 28, 1850, could only be acquired by patent prior to the act of Congress of March 3, 1857.

But the respondent may contend that the title of the State, under the act of September 28, 1850, to the land in controversy was confirmed by the act of March 3, 1857—11 U. S. Stat. 251. That act only applied to the selection of swamp and overflowed lands "heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under existing law of the Uni-

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ted States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law." Now the respondent has not brought himself within the provisions of even this law. He adduced no evidence on the trial that the land in controversy, at the time of the passage of said act, had been selected and reported to the Commissioner of the General Land Office as swamp and overflowed land; consequently there was no confirmation of the title to said land under that act.

No principle of law is better settled than the one where a duty is imposed by law upon a particular officer, that whatever determination he shall make in the discharge of that duty, in the absence of fraud, is final and conclusive—Hill v. Miller, 36 Mo. 182; Lewis v. Lewis, 9 Mo. 183; U. States v. Arredondo, 6 Pet. 729.

IV. No patent to the land in controversy was ever issued by the United States Government to the State of Missouri, as prescribed by the 2d section of the act of Congress of September 28, 1850.

V. The title to said land under said act did not pass, *proprio vigore* and unconditionally, to the State of Missouri for want of words of present grant.

VI. The title to said land was not confirmed to the State of Missouri by any act of Congress prior to the act of Congress of June 10, 1852.

VII. As the act of Congress of June 10, 1852, contained words of present grant, the title to the land described therein did pass *proprio vigore* and unconditionally to the State of Missouri.

VIII. By the adoption of the resolution of the board of directors of the Hannibal and St. Joseph Railroad Company on the 7th of March, 1853, definitely locating "the line or route" of the Hannibal and St. Joseph railroad, and filing a copy of said location in the General Land Office at Washington City ninety days after the completion of the same, the

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title to every alternate section of land designated by *even* numbers, for six sections in width on each side of said road, passed *proprio vigore* and unconditionally to said company.

*Prewitt and Wm. A. Hall*, for respondent.

I. The act of Congress of September 28, 1850, was a present grant of swamp lands to the States in which they lie. The 2d section (authorizing the selections thereof and patents therefor) was only for the purpose of settling the fact that the lands were swamp—9 U. S. Stat. 519; R. C. 1855, p. 1005; *Allison v. Half-ace*, 11 Iowa, 450; *Supervisors of Whitesides v. State's Att'y*, 31 Ills. 68-75; *Fletcher v. Pool*, 20 Conn. 100; *Hempstead v. Underhill*, 20 Ark. 337; 20 U. S. Dig. 809, § 284; *Fore v. Williams*, 35 Miss. (6 George) 533; 20 U. S. Dig. 801, § 80, opinion of Att'y-Gen. Black; *Aubuchon v. Ames*, 27 Mo. 92; *Dunklin Co. v. Co. Ct.*, 23 Mo. 453; *Lessieur v. Price*, 12 How. 60-76.

II. The swamp lands and railroad lands having been by Congress both granted to the State, and the State having, before granting the railroad land to the Hannibal and St. Joseph Railroad in 1852, granted the swamp lands to the several counties in 1851, the railroad received the land granted, subject to the swamp land grant to the counties—R. C. 1855, p. 1005.

HOLMES, Judge, delivered the opinion of the court.

This was an action of ejectment to recover possession of lands situate in the county of Macon, and claimed by the plaintiff under the acts of Congress of the 10th of June, 1852, and the 3d of August, 1854 (10 U. S. Stat. § 8, p. 346), granting to the State of Missouri a portion of the public lands in aid of the construction of certain railroads, and providing for a descriptive list of the lands granted, to be certified to the State from the General Land Office; and under an act of the General Assembly of the State, accepting the grant, and applying a portion thereof to the Hannibal and St. Joseph railroad, approved Sept. 20, 1852—Laws of 1853, p. 15.

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The defendant stood upon his possession as a purchaser from the County of Macon, under a grant from the State, and relied upon an act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850 (9 U. S. Stat. 519), and upon the acts of the General Assembly of the State of Missouri donating "certain swamp and overflowed lands to the counties in which they lie," approved March 3, 1851, and December 13, 1855—Laws 1851, p. 238; R. C. 1855, p. 1005.

The only evidence offered by the plaintiff to identify the specific tracts of land in controversy as a part of those which came within the operation of the act of Congress of 1852 as a grant of title for railroad purposes, was the descriptive list certified to the State by the Commissioner of the General Land Office, containing these lands, together with the map of the definite location of the railroad route. This list was made out and certified in conformity with the provisions of the act of Congress of the 3d of August, 1854, and was approved by the Secretary of the Interior, subject to any valid intervening right. The act provided as follows:

"That in all cases where lands have been or shall hereafter be granted by any law of Congress to any one of the several States and Territories, and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either of originals or copies of the originals, or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted thereby; but when lands embraced by such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, or claim, or interest, shall be conveyed thereby."

That the act of Congress of 1852 was one of the acts here referred to, there is little room for doubt. It did not directly convey the fee simple to any specific and certain tracts of land; nor did it require patents to be issued. The particular sections, or parts of sections, which were to be the subjects of the grant remained to be ascertained in future. The act itself made no provision for any kind of documentary evidence, to be issued from the Land Office, by which the location, boundaries and identity of the particular tracts of land granted within the six-mile limit were to be designated and proved. The public sectional surveys, showing the even numbered sections, within the six-mile limit, on either side of the located road, though admissible evidence, have been held to be insufficient for this purpose—*Baker v. Gee*, 1 Wall. (U. S.) 333; *Pacific R.R. v. Lindell's Heirs*, 39 Mo. 329. We suppose the proper effect of this provision of the act of 1854 to be, that such lists shall be regarded as evidence of this location and identity sufficient to bring the tract of land therein contained and described within the granting words of the act of 1852, and so to convey the title in fee simple; but if the lands embraced in such lists are not of the character contemplated by the act of Congress, and are not such as were intended to be granted thereby, then the lists are to have no effect as evidence.

Now, what is meant by the character of lands contemplated and intended to be granted by such act? The provision seems to refer to the given act of Congress itself for the explanation. This act of 1852 excepted from its operation all lands sold, or subject to the right of pre-emption, or in any manner reserved; and "all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever," were thereby again expressly "reserved from the operation of this act," excepting only the right of way for such railroads. It was plainly not the intention of the act to grant any lands for railroad purposes which had been re-

served to the United States, or in any manner granted and appropriated by law to any other object of internal improvement.

Less than two years previously, Congress had passed the act of 1850 (9 U. S. Stat. 519), whereby it was enacted that "the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted" to the States for the purpose of the reclamation of such lands in these States. The expression (*the character* of lands contemplated and intended to be granted), when applied to the act of 1852, may be taken to mean lands not sold, nor subject to pre-emption, nor reserved nor appropriated by law to aid in any object of internal improvement; and it may safely be affirmed that the first section of the prior act of 1850 amounted at least to a reservation to the United States of the swamp and overflowed lands therein mentioned. It was in terms a present grant, and was a solemn appropriation by law of all those lands to a specific object of internal improvement within the several States; and as such these lands were reserved and excepted out of the operation of the act of 1852, granting vacant and unappropriated lands for railroad purposes. It would seem to be very plain that it was not the intention of Congress to grant to the State, for railroads, the same lands which had already been granted to her for another and different object. It must follow, that if the lands in controversy were in fact of the character of swamp and overflowed lands within the purview of the act of 1850, then the certified list offered in evidence here, so far as it embraces these lands, which were not contemplated nor intended to be granted by the act of 1852, must, by the very terms of the act of 1854 itself, be held to be perfectly null and void.

The case seems to have been tried below, and has been argued here, upon the assumed theory, that the first section of the act of 1850 was a present and absolute grant, and vested title in the State at once, leaving nothing to be done in order

to show a vested title to any given tract, but to prove by evidence, even by the testimony of witnesses, that the land in question was, at the date of the act, of the character and description of swamp and overflowed land within its purview. This view of the matter cannot be sustained. The whole act must be taken together. This well settled rule of construction was applied to a somewhat similar act of Congress in the case of *Rice v. Railroad Co.*, 1 Black, (U. S.) 358. If the first section were the whole act, there might be some room for the position assumed, however difficult it might be to ascertain by proof the particular lands which were to be the subjects of the grant. This difficulty is provided for in the act itself. The second section makes it the duty of the Secretary of the Interior to ascertain the specific tracts of land in conformity with the sectional subdivisions of the public surveys, and to make out "an accurate list and plats" thereof, and transmit the same to the Governor, and on his request "to cause a patent to be issued to the State therefor, and on that patent the fee simple to said lands shall vest in the State"; and by the third section he is to determine whether the greater part of any legal subdivision is "*of that character*," and if so to include it in the list; otherwise not. No other way of ascertaining the particular tracts, for the purpose of passing the title in fee, was contemplated by the act; and it was obviously the intent of Congress, and is the proper legal effect of the act, that there was granted, and should be conveyed by patent, the lands which should be contained in that list; and none other are to be conveyed, though it was also clearly intended that all lands of that character should be included in the list and plats. Until the particular subjects of the grant shall be thus ascertained no title can vest; the lands granted are thereby rendered certain; and it may then be said that the legislative grant becomes complete to vest the title in fee even without a patent, the issuing of which may be considered as the act of a ministerial officer. It has been so held by the Supreme Court of Mississippi—*Fore v. Williams*, 35 Miss. 533. The act sup-

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poses that the Governor will accept the grant of the lands so listed and platted before a patent issues. In *Fore v. Williams*, a list made out by the Register under the direction of the Governor, and approved by the Secretary of the Interior, was held to be a substantial compliance with this provision. The Supreme Court of Wisconsin refused a mandamus to compel the School Commissioners to issue a certificate of purchase to a pre-emptor, under the laws of the State disposing of lands granted by the same act of Congress, for the reason that no patent had been issued, and no title vested in the State; and it was said to be "quite obvious that the fee simple to the land does not vest in the State until a patent issues"—*Parsons v. Comm'rs*, 9 Wis. 236. We think, with the decision in *Fore v. Williams*, that it may vest when the list and plats are made out, and approved by the Secretary of the Interior, and accepted by the Governor. In some other cases, where the question arose incidentally under State statutes disposing of these lands, the language of the courts might seem to give some countenance to a different opinion—*Allison v. Half-ace*, 11 Iowa, 450; *Whiteside Co. v. Att'y*, 31 Ills. 68; *Fletcher v. Pool*, 20 Ark. 100. But on a close examination it is evident that the possibility of the grant operating to vest a title in fee to any particular tract, before its definite location and boundaries were thus ascertained, was not contemplated. The case of *Hempstead v. Underhill*, 20 Ark. 337, is more nearly in accordance with the decision in *Rutherford v. Greene*, 2 Wheat. 197, which was the case of a grant of 25,000 acres of land within the lands to be allotted to the officers and soldiers of the army, and the words "*shall be allotted for and are given*" were held to be a grant by force of the act, not needing any further granting act; and that *when surveyed* it became a gift of the particular lands contained in the survey; that the survey gave precision to the title, "and attached it to the land surveyed"; and that the subsequent grant by another act related back to the inception of the title. This case was further explained in *Lesieur v. Price*, 12 How. (U. S.) 76. We have no doubt that

it presents the correct view of the law, and we take it to be clearly to the effect, that, until the particular lands on which the act is to operate as a grant of title shall be ascertained and designated in the manner pointed out by the act itself, the grant cannot attach to any specific tracts. Until then, there is no title which can give the party a standing in court either at law or in equity. Whatever equity there may be must be considered as addressed to the political power; though there be such an inchoate equitable right as may be the subject of alienation, and constitute a basis for the operation of the doctrine of relation, whenever the title in fee shall pass out of the United States. The power to determine on what specific tracts of land the act shall operate as a grant of title, is given to the Secretary of the Interior. This is a political function, and is beyond the control of the courts—*West v. Cochrane*, 17 How. (U. S.) 403; *Magwire v. Tyler*, 1 Black, 195; *Stanford v. Taylor*, 18 How. (U. S.) 409; *Menard v. Massey*, 8 How. (U. S.) 293; *Lafayette v. Kenton*, 18 How. (U. S.) 59.

It appears that the States have dealt with these lands in the same way as if the act had been an absolute grant vesting a present title in fee, and the courts have recognized the right of the State to dispose of them, under its own laws, before a list was made out, or a patent issued—*Mast v. Hamilton*, 14 La. Ann. 775; *Dunklin Co. v. District Ct.*, 24 Mo. 449, and cases above cited. Whatever legal ideas may have been intended in the expressions which have been used in these cases in relation to the grant and title, there would seem to be no room for question that the act amounted at least to an appropriation by law of all such lands within the several States to the specific purpose of fulfilling this grant, and made an effectual reservation of them, to be applied under the act to that purpose, and to no other, and to be listed and platted, and patented to the States for this special object of internal improvement. More express words of reservation than those employed in the act of 1852 were not needed for the purpose of making the reservation embrace these

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lands which had been thus specifically appropriated by the act of 1850 to fill this grant to the States. The language of Baldwin, J., in *Wilcox v. Jackson*, 13 Pet. 498, may find a proper application here:—"Whosoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands, and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it." A sale of lands so appropriated or reserved, and even a patent, without further legislation to authorize it, has been held to be void—*State v. Ham*, 19 Mo. 602; *Brown v. Clements*, 3 How. (U. S.) 667.

Though the lands had been thus appropriated and granted, the political power over them was not wholly relinquished, but was to be exercised by the public officer to whom it was committed by the act itself, in good faith, and in such manner as to accomplish the object of the grant and the intent of Congress—*Foley v. Harrison*, 15 How. (U. S.) 433. Whenever the title in fee shall become vested in the State, it cannot be doubted that it will relate back to the date of the grant, and will vest by relation in the grantees under the State and counties; and such title would be prior and superior to any title that could be acquired under the acts of 1852 and 1854—*French v. Spencer*, 21 How. (U. S.) 228; *Landes v. Brant*, 10 How. (U. S.) 248; *Ross v. Borland*, 1 Pet. 664; *Rutherford v. Greene*, 2 Wheat. 197; *Gibson v. Chouteau*, 39 Mo. 588.

These particular sections and parts of sections have been embraced in the lists made out under the acts of 1852 and 1854 as a part of the grant for railroads; and if Congress had submitted the final determination of this matter to the decision of the Secretary, or Commissioner, there could be no doubt that the title shown by the plaintiff here should prevail in the action of ejectment, no vested legal title being shown by the defendant; for, though the lands were reserved, Congress still had power to dispose of them. But such is

not the case. So far as this list embraced lands which were not of the character contemplated by the act of 1852, nor intended to be granted thereby, it is by the very terms of the act of 1854 itself null and void, and can be no evidence of title.

The question remains by what kind of evidence it is to be judicially determined, whether the lands in controversy came within the purview of the act of 1850, or were not of the character of lands intended to be granted by the act of 1852. No doubt, if the Secretary of the Interior had included these lands in his list and plats of swamp and overflowed lands, his action would have been final and conclusive of that matter in the courts; but his including them in this list of railroad lands is not conclusive. It was left open by Congress to be determined on judicial investigation. The power to determine it finally was not given to any public officer. The political power over the subject was not retained by the government, but it was made a question of evidence and judicial construction, and we think it was intended to be, and was, referred to the courts.

The act of 1852 does not appear to have required any selection or listing of the lands embraced within the even numbered sections within the six-mile limit, but only of those which should be selected in lieu of them outside of that limit and within fifteen miles of the line of the railroad; but the statutes of the State did require a selection of both kinds to be made by the agents of the State, and a map of the lands selected to be recorded in each county where the land was situated; and the practice of the Land Office seems to have been to include both in the lists. No means of proving a title to the specific lands granted was provided by the act itself. The act of 1854 seems to have been intended to supply this defect. In *Baker v. Gee*, 1 Wall. 333, these descriptive lists were recognized as being the proper evidence to show "the lands to which the road was entitled"; the validity of the State statutes imposing burdens and conferring privileges upon the grantees of the State was admitted; and it was held

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that this corporation could not recover against a defendant claiming by pre-emption under the State, without showing that a map of the lands selected and located for the railroad had been duly recorded, as required by the statute—*Pacific R.R. v. Lindell's Heirs*, 39 Mo. 329; *Hann. & St. Jo. R.R. Co. v. Moore*, 37 Mo. 338. No such map was offered in evidence in this case, and the question was not raised on the trial below. The plaintiff relied exclusively upon the list of the Commissioner, approved by the Secretary. Neither of these officers had any more power over the subject than was given to him by the act of Congress itself; and it is plain that these lists were not intended to be final and conclusive. It is equally plain that Congress did not intend by this act of 1854 to make any new grant of lands which had not already been granted by the act of 1852; and it must have been the intention of Congress that the question of the character of lands, contemplated and intended to be granted by that act, should be determined upon judicial inquiry, whenever this list should be offered in evidence in court: therefore the list must admit of rebuttal and disproof. Why may not this be done by any competent and admissible evidence? We are not aware of any law that would require it to be done by documentary evidence only. It might be done by documentary evidence showing a prior or better title in the defendant; but he is not put to such a defence. The inquiry is, whether these lands were of the character of swamp and overflowed lands unfit for cultivation, at the date of the act of 1850, either in the whole or in the greater part of any given sectional subdivision, and the testimony of witnesses is offered for the purpose of showing that as such they fell within the purview of that act, and were taken out of the operation of the act of 1852. This is wholly a matter of fact *in pais*. Such evidence is admissible to bring a given tract of land within the operation of a legislative grant; and it may be admitted to take it out, where no positive statute nor any rule of evidence intervenes. The determination of this matter of fact may as well be left to a jury in the one

case as in the other. If such were in fact the character of these lands, then the Commissioner had no authority by law to include them in this list, and, though included, the list can have no effect as to them.

The reason why the same kind of evidence should not be admitted to show a title vested and complete under the first section of the act of 1850 is, that the other sections have provided a different mode of establishing title under that act, and require another kind of evidence, which is thereby made the best and the only admissible evidence for that purpose. The case has been argued, apparently, upon the theory that this testimony was offered for the purpose of proving a title vested in the defendant. For that purpose it was certainly not admissible; but for the purpose of rebutting and invalidating this list, produced in evidence by the plaintiff, we think it was admissible and competent.

Under the instructions which were given, the cause was submitted to the jury, and the verdict must have been rendered, substantially, upon this issue of fact. If this fact were found for the defendant, then the plaintiff had shown no title to the lands in controversy. He must recover on his own title or not at all; and it was immaterial whether the defendant had shown any title or not: he had a right to stand on his possession until a better title were proved.

The first instruction refused for the plaintiff contained a correct proposition of law, and might have been given if there had been any evidence before the jury on which the issue supposed in it could properly arise. It concerned the defendant's title only, and that was immaterial. There was, therefore, no error in refusing it of which the plaintiff can complain.

The other instructions refused for the plaintiff are sufficiently disposed of by what has been said above: they were either erroneous or immaterial. As to the difference between the expressions "*in the majority of years*," and "*in each year*," in reference to the fitness of the lands for cultivation,

we are inclined to think the former was the more nearly correct.

The instructions which were given for the defendant, though somewhat vague, and apparently based upon legal ideas which are not very clear to us, were nevertheless substantially correct, or, at least, not so clearly erroneous, in any respect, that the plaintiff could have been seriously prejudiced. The first one made the plaintiff's right to recover depend upon the question of fact, whether these lands were of the character of swamp and overflowed lands unfit for cultivation, and, taken together with those given for the plaintiff on the same subject, placed the issue fairly enough before the jury. Whether the phrase "*a present absolute grant thereof*" meant a fee simple, or an appropriation by law, in either case the plaintiff's right to recover depended on the issue of fact which the instructions submitted to the jury. The second and third instructions would seem to have been correct enough so far as any principles of law were involved in them, and we do not see that they were materially erroneous. Their bearing upon the issue was very remote. We cannot say that the plaintiff has suffered any prejudice by their having been given.

The jury were to judge of the weight of the evidence, and, the issue having been found for the defendant, the verdict will not be disturbed.

Judgment affirmed. The other judges concur.

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
OCTOBER TERM, 1867, AT ST. LOUIS.

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THE MURPHY AND GLOVER TEST OATH CASES.

*Constitution — Test Oaths — Clergymen — Attorneys — Bills of Attainder — Ex post facto Laws.* — The Supreme Court of the United States having decided, in the case of *Cummings*, 4 Wall. 277, that the *oath of loyalty* prescribed by the Constitution of this State, art. 2, §§ 3, 6, 7, 9 & 14, in reference to clergymen, and, so far as relating to past acts, to be a bill of pains and penalties within the prohibition of the Constitution of the United States, and therefore unconstitutional and void, the court accepts the authority of that decision as establishing the rule in similar cases. The decision in the case of *Ex parte Garland*, 4 Wall. 333, applies the same rule to the case of attorneys.

Per HOLMES, J. The persons affected by the test oath were entitled to the benefit of the legal presumption of innocence, in conformity with the great principles of public law which constitute the law of nations, as recognized by the Constitution of the United States. Those who were citizens, and became rebels and criminals in law, are by the amnesty proclaimed restored to their former estate and condition of citizenship, and must thenceforth be presumed innocent until convicted of some new crime; and are entitled to the common benefit of the laws and government, and to nothing more: they owe obedience to the laws, and are entitled to the protection of the law. For their opinions and feelings, when not put forth in any new acts

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of resistance, they are not responsible to the civil state. The right of trial by jury, and the presumption of innocence involved therein, is protected by the Federal Constitution, and cannot be infringed by a State. Natural rights become civil rights when defined, declared and secured by the laws of the civil state, and when properly secured they constitute civil liberty. The rights of life, liberty and property (that is, personal security, personal locomotion or freedom from arrest, and private property), when they exist, are protected by the Federal Bill of Rights from being taken away in any criminal case without due process of law. The courts must determine the question, whether a legislative enactment is in its effect and intention a legislative sentence of punishment, and the intention must be discovered from a true construction of the law and from the effects produced by it. The effects produced must be presumed to have been within the intention of the legislative body enacting the law. The exclusions and disabilities of the oath of loyalty refer directly to the enumerated acts, and it is assumed that these persons have done some one or more of the acts, of which some are manifestly crimes, and all are dealt with in the same way as if they were of like nature; the truth of which they are obliged to confess by the impossibility of their taking the oath, thus effectually changing the rules of evidence and subverting the presumption of innocence retrospectively in every individual case, contrary to the law of nations and the national right of trial by jury in criminal cases. It must be assumed that the legislative body intended to do what is actually done, and that would seem to be, essentially, nothing else than a legislative sentence of punishment for past conduct as criminal; and so it may be concluded that the act itself assumes judicial magistracy, weighs the offence and the proofs, decides upon the necessity and fitness of the penal judgment, assumes the guilt, ascertains the persons, and declares the punishment.

THE STATE OF MISSOURI, Respondent, *v.* DAVID H. MURPHY,  
Appellant.

Same *v.* PATRICK A. RYAN.

Same *v.* BENJAMIN F. MILES.

*Appeals from Cape Girardeau Circuit Court.*

*Davis & English*, for appellants.

*Mc Williams*, for respondent.

THE STATE OF MISSOURI *v.* ASHAEL MUNRO.

*Appeal from Cape Girardeau Circuit Court.*

*Dryden & Lindley*, for appellant.

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THE STATE OF MISSOURI v. HENRY STROMBERGER.

Same v. same.

*Appeal from Scott Circuit Court.*

*English & Green*, for appellant.

*McWilliams*, for respondent.

THE STATE OF MISSOURI v. SAMUEL T. GLOVER.

*Appeal from St. Louis Criminal Court.*

\* *Whittelsey*, for appellant Glover.

The defendant was indicted and found guilty of having practised as an attorney-at-law, after the adoption of the new Constitution, without first having taken and filed the oath of loyalty prescribed by secs. 9, 6, 3 and 14 of art. 2 of that instrument.

It was admitted upon the trial that the defendant had been regularly admitted and licensed to practise law in all the courts of this State, by virtue of the laws in force, sixteen years ago, and that he had since continued to practise in the courts up to the time of the finding of this indictment, and that he had not taken the oath of loyalty as required by sec. 9, art. 2, within sixty days after the Constitution went into effect.

The defendant prayed the St. Louis Criminal Court, upon the facts admitted, to declare several propositions of law, which were refused, and, a motion for new trial being overruled, the case is brought up by appeal.

Before presenting the propositions of law and commenting thereupon, let us first know the true position of the parties, so as to learn what principles may be applicable to the facts. The defendant has been a citizen of and residing in this State for sixteen years, and was duly licensed to practise, and was enrolled upon the records and practised in the courts. His case, therefore, must be judged by different rules, and, in part, upon different principles, from that of one for the first

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\* The importance of the principles involved in these cases, and the extended history of the law of "Attainder," and of Bills of Attainder and Test Oaths, presented by the counsel in the Glover case, induces the reporter to publish the argument at length.

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time applying for admission to the bar. The defendant claims his right to practise law, no matter what the extent of that right may be, from the Constitution and laws in force at the time he was permitted to practise. We consider the right thus given as a franchise, which belonged to him for life, and which could not be taken away except as a punishment for some offence committed, some law violated. The particular character of this right or franchise we defer to a subsequent part of our argument; it is sufficient for our present purpose that the provisions of the new Constitution, art. 2, secs. 3, 6, 9 and 14, do act upon and affect antecedent rights, privileges, or franchises; that a right which the defendant enjoyed before the new Constitution was formed, is taken away sixty days after that instrument goes into effect. It is taken away from him without alleging and proving that he has committed any crime, or violated any law; his licence is taken away peremptorily, without cause assigned, and he may procure a new licence upon taking and filing the oath prescribed. The old right is forfeited, and a new right must be obtained.

The first proposition which I present is—That the provisions of the new Constitution, art. 1, secs. 3, 6, 9 and 14, so far as they apply to attorneys previously citizens of the State of Missouri, and under its former laws duly licensed and admitted to the practice of law, are in violation of the Constitution of the United States, for the reason that they are in the nature of a bill of attainder, or a bill of pains and penalties, and therefore null and void.

We must therefore consider the nature and character of bills of attainder, which really include bills of pains and penalties. I find upon examination that it will not do to rely simply upon the definitions of the later text writers, writing upon a subject which at the time possessed no particular interest.

“Bills of attainder are said to be (2 Sto. Const. § 1344) such acts of the Legislature as impose capital punishment upon persons supposed to be guilty of high crimes and offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If they impose a milder punishment than death, they are called bills of pains and penalties. Bills of attainder may include bills of pains and penalties, they may affect the life of an individual or his property, or both,” and, I add, they may affect his person, and not his life; his personal, civil, or political rights, and

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not his property. I define a "bill of attainder," in its most general sense, as a legislative enactment by which the legislative power affixes upon any individual by name, or upon any class of persons by description, any pain, penalty, punishment, or stain, either as a consequence of some past acts by them done, or not done, or from the mere will of the sovereign power.

In my argument in the case of *Cummings*, which was prepared hastily, I took the simple statements of Blackstone as giving the whole history and law of attainder; but examinations of the history of attaints, judicially and by legislative enactments, have convinced me that I was too hasty in taking up an opinion, and that the thing forbidden by excluding "bills of attainder" was more comprehensive than I had supposed. Upon an argument addressed to a court, I must not give a historical essay; but every good lawyer knows that you can never determine what a law really is until you have learned where and how it emanated—what where the feelings, beliefs and wants of society which gave it being—and how it has been gradually elaborated and made to serve the purposes of society, or of those who controlled the government.

Attainting was the attaching to the person a stigma, from which by law certain consequences, more or less extensive, were made to follow. The principal consequence was forfeiture of lands and tenements, goods and chattels, as in cases of felony; to which was added, in some cases, corruption of blood—4 Black. Com. 94, definition of Felony.

As felonies and crimes punishable by forfeiture were generally, in the early English law, also punishable with death, some writers have spoken of attainder as if death was always a part of the penalty or consequence of the attainder, which is a mistake, as we shall show. "Attainted," in the old English statutes, is generally used as equivalent to the words "adjudged to the penalties of" the crime named; sometimes it is synonymous with the common use of the word "convicted," as implying not only the verdict of guilty, but the judgment upon such verdict. I shall give instances of the various uses of the word to prove the correctness of my definition.

Blackstone says "attainder" was the consequence of the judgment which condemned the criminal for a capital offence—4 Blk. Com. 381. It would have been more correct to say that "attainder" was the judgment itself, and that its

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consequences are forfeiture, &c., of lands, goods and personal rights, and corruption of blood.

Death was not always the consequence of an attainder. For instance, a party attainted of a *præmunire* did not forfeit his life; death was not the penalty attached to a judgment in such cases. By stat. 16, Rich. II., ch. 1, the penalty ordained in cases of *præmunire* was, that the offenders were to be out of the King's protection, to forfeit their lands and goods, to be imprisoned and detained at the King's pleasure: and if the offenders were not found they were to be outlawed.

"Attainder of *præmunire*" is a common term used in the old English law books and statutes. In Lord Vaux's case, 1 Bulst. 197, he was adjudged to be out of the King's protection, to forfeit lands, tenements, goods and chattels to the King, and to be imprisoned during life. In *Grosse v. Gayer*, Cro. Car. 193, 172, Tregosse was indicted for a *præmunire*, attainted by verdict, and the question was, did the attainder in a *præmunire* have relation back to the time of the offence, or only to the time of the judgment?

There was an "attainder by abjuration," by abjuring the realm, and also an "attainder by outlawry." Attainder was distinct from forfeiture, for the corruption may be saved and the forfeiture remain.—See Jac. Law Dic., Outlawry, *Præmunire*, Abjuration.

By act 27 Eliz., ch. 2, directed against Jesuits and priests of the Church of Rome, priests coming into the realm, except in special cases, were to be adjudged guilty of high treason. By sec. 5 of the act, every person receiving such were declared guilty of felony, to suffer death, and lose and forfeit as in cases of one attainted of felony.

By the act of 5 Eliz., ch. 1, also directed against the Catholics, it was enacted "that every person who by writing, printing, teaching, preaching, or by deed or act setting forth and maintaining the jurisdiction and power of the bishop of Rome, &c., their aiders and abettors, should incur the penalty of *præmunire* prescribed by statute of 16 Rich. II. By sec. 5, all officers in the kingdom of every description, all officers in the church, all persons admitted to degrees in the universities, all schoolmasters, and public and private teachers of children, were to take the oath of abjuration and allegiance prescribed by Stat. 1 Eliz., ch. 1, § 19; and by sec. 8 it was provided that all persons refusing to take such oaths, and convicted or attainted at any time thereafter, should suffer

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the penalties of *præmunire*; and by sec. 10, for refusing to take such oath when tendered the second time, they were to suffer the penalties of treason. Sec. 21 of the same act provided that it should not be lawful to kill any one "attainted of a *præmunire*." Section 23 uses the word "attainted" as equivalent to "to be convicted."

The act 3 of Jas. I., ch. 4, also directed against the Catholics, and similar to that of Elizabeth, and providing similar penalties, made attempts at conversion to the see of Rome high treason; but sec. 28 provided that attainder of felony under the act should not work corruption of blood, nor disinherit the heirs of the persons attainted.

As generally the Parliament of England, especially in former times, declared in accordance with their terrible criminal code, every offender at whom they struck by special statute guilty of high treason, we have generally thought that the penalty or consequence of every attainder was death, forfeiture, and corruption of blood. We have seen that all these consequences did not follow every attainder at law when declared as the judgment of a judicial tribunal. Against the omnipotent power of kings, lords, and commons, there was no appeal. The attainders of one reign might be reversed in the next, or even in the course of a few short years by the same power that affixed them.

With permission of the court, I will refer to some of the English acts of attainder, that we may learn what are the characteristics of such acts, their peculiar qualities, which induced the framers of our Constitution to prohibit all such legislation, not only to the States but also to the United States.

In the early history of civilization, when the state first began to punish crimes as injuries done to the state rather than to the individual or family, crimes were punished by special legislative acts, directed against the particular act and person, and not by judicial process under a general law applying to all acts of a similar character—Maine's Anc. L. —). It was acting upon past conduct, not prescribing a rule for future conduct.

The act of attainder of 11 Rich. II., ch. 1, directed against the Archbishop of York, Earl of Suffolk, and others, and their adherents, speaks of the parties named as having been attainted by Parliament upon trial, upon the appeal of the Duke of Gloucester, and declared that none of the traitors attainted by the appeal aforesaid should receive pardon. It

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attainted some after they were dead, in which case the penalty could only be forfeiture and corruption of blood. By 20 Rich. II., ch. 6, some of the persons thus attainted when out of the realm were licensed to return. The act of 11 Ric. II., ch. 3, forfeited the castles, lands, estates, &c., of the Bishop of Chichester and other named parties. Act 28 Hen. VIII., ch. 12, attainted Eliz. Burton et als. for slandering the divorce of Henry from Catherine of Arragon, and his marriage with Anne Boleyn. The act is not given at length in the Statutes at Large, but merely the title. The act 33 Hen. VIII., ch. 20, § 2, uses the words "attainted of high treason" as equivalent "to be adjudged to suffer the penalties of high treason," and declares that attainer by due course of the common law or statutes of the realm shall be as good as if by act of Parliament. Act 33, Hen. VIII., ch. 20, attainted Queen Catherine Howard of high treason for her incontinence, and forfeited the property of herself and her accomplices to the King. Title only found in the Stat. at Large. Act 3, Ed. VI., ch. 17, confirmed the attainder of Wm. Sherrington, who was "indicted and attainted by confession of high treason" for counterfeiting the coin. He was pardoned and restored by 3 & 4 Ed. VI., ch. 13. Acts 2 & 3 Ed. VI., ch. 18, attainted Lord Seymour of high treason, but provided for paying his debts. 9 Hen. VI., ch. 3, confirmed the attainder of Owen Glendower. 1 Mary St. II., ch. 16, confirmed the attainder of the Duke of Northumberland, Archbishop Cranmer, et al. 13 Eliz., ch. 16, confirmed the convictions, outlawries and attainders of the Earl of Westmoreland, and fifty-seven others, attainted of treason for rebellion. 29 Eliz., ch. 1, confirmed attainders of Lord Paget et als., and provided that there should be no reversal of attainder by the heirs after execution. 35 Eliz., ch. 5, confirmed attainder of Sir Francis Englefield, who went forth of the realm by licence, but was attainted. 3 Jas. I., ch. 2, confirmed attainder of the conspirators in the Gunpowder Plot. It speaks of one as "indicted, convicted and attainted by his own confession"; of another, as "indicted, arraigned, convicted by verdict, and thereupon attainted." It attaints Catesby and four others who had been slain in open rebellion, and Tresham, who had died in the Tower before judgment.

From these acts—33 Hen. VIII., ch. 20; 3 Ed. VI., ch. 17; 9 Hen. VI., ch. 3; 1 Mar. St. II., ch. 16; 13 Eliz., ch. 15; 29 Eliz., ch. 1; 35 Eliz., ch. 5; 3 Jas. I., ch. 2—it would

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seem as if in those days it had been a mooted question, whether there could be an attainder for high treason except by a special act of Parliament. Notice the confirmation of judicial attainders in the different acts, and the express provision of 33 Hen. VIII., ch. 20, declaring that judicial attainders, attainders by due course of the common law, or under the provisions of the statutes, should have the same effect as attainder by act of Parliament.

Thomas Cromwell, Earl of Essex, 32 Hen. VIII., ch. 60 (to be found in the appendix to Burnet's Reformation, App. 16, bk. 3, vol. 4, N. Y. ed., p. 105), was attainted for heresies and treasons: "Shall be and stand, by authority of this present Parliament, convicted and attainted of heresie and high treason, and be adjudged an-abominable and detestable heretick and traitor, and shall have and suffer such pains of death, losses and forfeitures of goods, debts and chattels, as in cases of heresie and high treason, or as in cases of either of them, at the pleasure of your most Royal Majesty, and shall lose and forfeit all his lordships, manors, lands," &c.

Strafford's attainder, 16 Car. I., ch. 38 (to be found in 1 Rushworth, 756), has this curious proviso: "That it shall not be taken for a precedent in like cases." It struck at the liberties of the citizen, whom, with all their ingenuity, they had failed to convict of the crimes the Commons had alleged against him in their impeachment before the Lords. The history of those days is repeating itself in our own times, and the detailed history of the Great Rebellion, as it shows itself in the pages of Rushworth, and in the original documents of the time, is full of instruction for us. The ordinance for the attainder of the Archbishop of Canterbury will be found in 5 Rushw. 785. Ordinances for requiring oaths approving the King's death; for seizing and sequestrating the estates, real and personal, of the bishop named, and of the bishops, deans, chapters, and of all persons, ecclesiastical or temporal, who had adhered to the King; ordinances for assessing malignants' estates; requiring oaths to support and maintain the Solemn League and Covenant—read by the light of the statutes of Charles II. and the history of his reign—give us some means of judging of the course of revolutions. After Cromwell's *coup d'état*, he proclaimed a constitution for the government of England, Scotland, and Ireland, on the 16th December, 1653, making himself Lord Protector, and vesting in himself all legislative and executive powers.—See 6 Somers' Tracts, 284. The constitution endured during Crom-

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well's life, but in 1660 the act of 12 Car. II., ch. 30, attainted of high treason Cromwell, Ireton, Bradshaw, and Pride, after their deaths, as if they were living, and attainted those regicides who had fled the realm, and those under arrest, and declared that "they and every one of them stand and be adjudged, and by authority of this present act convicted and attainted of high treason"; and that all their lands, goods, chattels, &c., should be forfeited, &c. As Jack Cade had nothing to forfeit, and had been killed in the insurrection, the act of 31 Hen. VI., ch. 1, attainting him, seems to have been designed to affix upon him the stigma of a traitor, and declares that "the said Jack Cade shall be reputed, had, named and declared a false traitor," &c., and that his acts, orders, &c., shall be void and be put out of remembrance forever, &c.

I desire to call the attention of the court to other acts of attainder in the English statutes before I draw the conclusions from them which I think they warrant. The founders of our Constitution were familiar with English history, and their own experience during the war of the Revolution had taught the serious lesson that the passions of war needed every restraint that could be placed upon them, and that war was not the school of freedom.

An act for disabling and banishing the Earl of Clarendon was passed 19 Car. II., ch. 10.\* The acts 13 and 14 of Wm. III., ch. 3, for attainting the pretended Prince of Wales, use nearly the same terms with the statutes I have cited. Bolingbroke, who had fled to France, was declared attainted by act (1 Geo. I., st. 2, ch. 16), unless he surrendered himself for trial as a traitor, and adjudged to suffer as a person attainted of high treason ought to forfeit and suffer. See also attainder of Duke of Ormond, 1 Geo. I., st. 2, ch. 17, and attainder of Alexander, Earl of Kellie, 19 Geo. II., ch. 36.

I refer also to acts inflicting pains and penalties:—1 Geo. I., ch. 17, George Kelly alias Johnson; he was to be imprisoned during pleasure, and to forfeit all his lands, goods, chattels, &c. 1 Geo. I., ch. 17, to inflict pains and penalties on Francis, Bishop of Rochester; he was banished into perpetual exile; if he returned he was to suffer as a felon, and all who harbored and concealed him were declared guilty of felony; and all who held correspondence with him by letters, messages or otherwise, directly or indirectly, were also de-

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\* Given at length, *ante* p. 87.

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clared guilty of felony.† See also act 11 Geo. III., ch. 55, to incapacitate Jno. Burnett, and sixty-seven others named, from voting at elections for members of Parliament, &c.‡ Hallam in his Constitutional History, ch. 16, calls the act of 1 Geo. I., ch. 17, an attainder of Rochester. Pains and penalties inflicted upon Sir John Fenwick, 7 & 8 Wm. III., ch. 3. The act 8 Wm. III., ch. 5, required Sir Geo. Barclay et als. to surrender or be attainted. Pains, penalties and forfeitures of certain regicides, 13 Car. I., st. 1, ch. 15. Reversal of Stafford's attainder, 13 & 14 Car. II., ch. 29. Attainder of Thomas Dolman et als. for not rendering themselves, 17 Car. II., ch. 5. Attainder of Sir George Barclay et als. not rendering themselves, 8 Wm. III., ch. 5, and for keeping Counter et als., and those who may be arrested, in custody without bail. Imprisonment of Counter et als. continued, 9 Wm. III., ch. 4; 10 & 11 Wm. III., ch. 13, & 1 Anne, ch. 29. Of the Earl of Kellie et als. unless they surrender, 19 Geo. III., ch. 26. Act to inflict pains, &c., on John Plunket, 15 Stat. at Large, p. 65.§ Nearly all these bills of attainder or pains and penalties (when the offenders had escaped or were in prison) declared that all persons aiding the offenders, or corresponding with them, should be guilty of felony and suffer death, and forfeit as in case of felony.

Let us inquire what are the qualities common to all these different statutes we have cited :

1. They all inflicted forfeiture of rights ; they did not always produce corruption of blood.

2. They were all statutes contrary to the course of the common law, made to serve a special purpose, acting upon the past acts of individuals, and were not rules for the future conduct of the community generally ; although in some cases prescribing a rule for some few persons who might be connected with named offenders, as their aiders and abettors and accomplices.

3. In some cases they allowed parties to surrender and take their trials, and punished them if they failed to come forward and stand trial.

The particular character, then, which marks all bills of attainder, which includes bills of pains and penalties, is this : that they are intended to serve a particular purpose, and to inflict some pain, penalty, punishment, or stigma, upon the individuals by name, or by description as a class, in conse-

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 † Ante p. 88.

‡ Ante p. 93.

§ Ante p. 91.

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quence of some previous acts by them done or omitted to be done. In all cases cited there was a forfeiture of rights, liberties, and franchises.

The distinction between a statute of attainder and an *ex post facto* law appears to be this: an *ex post facto* statute is a general law; a statute of attainder is a special law. From this induction, I proceed to inquire whether the provisions of the Constitution, art. 3, §§ 3, 6, 9 & 14, so far as they apply to an attorney duly licensed and admitted to practise in the courts of the State prior to the adoption of the Constitution, do inflict any pain, or penalty, or punishment. The defendant was a citizen of this State, duly licensed and admitted to practise as an attorney and counsellor at law in all the courts of this State prior to the adoption of the Constitution. That fact is admitted of record. I affirm that such licence was a franchise belonging to him; that it was a franchise for life, and that he only could be deprived of it as a consequence of some violation of a law that was to regulate not his past but his future conduct. If he be deprived of this franchise on account of some act done before the law was enacted, the law would be an *ex post facto* law, or an attainder.

In the case of the attorney's oath, 20 Johns. 492, Platt, J., said: "In my opinion, an attorney or counsellor does not hold an office, but exercises a franchise or privilege: they are not public officers." This was said upon the question, whether attorneys applying to be admitted to the bar should be required to take the oath prescribed by the act of 1816, that they had not been engaged in a duel, the new Constitution having provided the oath to be taken by public officers.

Blackstone (2 Com. 37) defines a franchise or liberty as "a royal privilege, or branch of the King's prerogative, subsisting at the hands of a subject"; that they must be held from a grant or prescription. He cites a large number of franchises, such as manors, lordships, franchise of wrecks, &c.; of fisheries, forfeitures, deodands, franchises of corporations, &c., &c., in all of which the subject has an estate.

The State has seen fit, for its own purposes, to restrict the practice of the law to a particular class of persons, who have proved their possessing the necessary qualifications. It is not thrown open to every man in the community; it therefore becomes a franchise, or liberty, granted by the State to individuals, upon sufficient considerations, and, being once granted, it cannot be taken away, except as a penalty for

some offence. The State does not possess absolute power; it is forbidden the doing of certain things by the great Sovereignty of the Nation. It cannot declare a forfeiture of the franchises it has granted, except in pursuance of some law providing such forfeiture as a penalty for the future violation of that law. It cannot, directly or indirectly, declare such forfeiture as a consequence of some past act.

The defendant had his licence in accordance with the laws of the State; that licence granted him a franchise, a liberty for his life, or during his good behavior. How can the State take that right away? I am aware that courts have spoken of the right of the State to regulate trades and professions, but we must consider the facts of the cases upon which the courts were reasoning.

The question in the case of *Simmons v. State*, 12 Mo. 268, was upon the power to tax the profession of an attorney, not whether they could not take away his licence for no cause whatever. They could not, under the guise of taxation, destroy his privilege without a violation of the Constitution.

The case of *Austin v. State*, 10 Mo. 591, was the case of one applying for a licence as an auctioneer, not that of one already possessing a licence. But suppose Austin had paid the tax and received a licence, he possessing the qualifications presented by the statute, could the State take away that licence before the time limited had expired? The law had created the franchise, granted it, and it could not legally destroy or revoke its grants. Suppose it had granted a licence to an auctioneer for life in consideration of the payment of a tax of one thousand dollars, could it by any change of the law destroy or revoke the licence already granted? Would not the grant of such a franchise be as good as a grant of a tract of land? It is well settled that the Legislature cannot revoke a grant of land or of a franchise. The decisions upon that point are numerous—*Fletcher v. Peck*, 6 Cranch, 87, and *New Jersey v. Wilson*, 7 id. 164, which was the case of the grant of the franchise of the exemption of lands from taxes. As to corporations, see *Ang. & A. on Corp.* § 671 and notes; *Pingrey v. Washburn*, 1 Aik. 264. But I need not cite the cases here. I refer to them in connection with the points we have been discussing, the forfeiture of defendant's franchise or privilege of practising as an attorney.

The defendant has his licence—it is taken away from him, and that is a forfeiture of his privilege or licence. How is it taken away and forfeited? By an enactment applicable

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to the special case, a *pro re nata* law, not intended to be a permanent rule of action, as appears upon the face of the law itself. It matters not whether the law we are considering was enacted by the Legislature or a Convention of the people of the State, for we are testing the validity of the law by that supreme law, the Constitution of the United States, which binds every citizen to obedience in all parts of the land, from the rolling waters of those seas upon our northern borders to the sun-lighted waves of the Gulf of Mexico; from the stormy billows of the Atlantic to the gentle ripples of the far-reaching Pacific. The right is forfeited, taken away from the defendant, unless he will do something which he was not required to do by the law under which he received his licence.

This is not the case of a person applying for the first time for admission to practise, asking for a licence, for that would present an entirely different question; if one apply for licence, he must take it upon the terms the State may see fit to impose. The defendant is not asking for a new licence; he claims the right to exercise the faculties granted him by the licence issued years ago, when party passion had not sapped the fortress of the public reason, nor undermined the temple of our liberties. His franchise is forfeited unless he take an oath purging himself of crimes against the nation and the State; unless he swear he has not committed treason, that he has not sympathized with it; unless he swear that he has committed none of that long catalogue of acts described in sec. 3 of art. 2. His franchise is forfeited without giving him an opportunity of being heard before the judicial tribunals of the country. By the very force of the law itself he is forbidden to use the franchise granted; its value is destroyed, the very thing granted is taken away, until he do—what? Take an oath purging himself of past crimes and offences; not that he will for the future be loyal and obedient, but that he has been so in the past. If Rochester or Bolingbroke had surrendered and stood their trials, the acts of attainder would never have taken effect; but as they did not surrender, they stood attainted. So, if the defendant will take the oath, he shall retain his franchise; but if he will not take the oath, he shall forfeit his franchise. He has the alternative, swear or forfeit. Like the infidel at the sword point of the follower of Mahomet, he has the choice between death and conversion.

Suppose the language of the provisions of the sections of

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art. 2, referred to had read in the following manner: "Every attorney or counsellor in this State, under a licence heretofore granted in pursuance of law, who has, at any time previous to the adoption of this Constitution, committed treason against the United States or this State, or who has, by words uttered, manifested his sympathy with those now engaged in rebellion against the United States, or who has sought to avoid the draft into the military service of the United States or the enrolment in the militia of this State, shall forfeit his licence as an attorney," could there be any question in the mind of any reasonable man that such a law would, in principle and effect, be an act of attainder, a law passed for a special purpose, forfeiting the rights and liberties and franchises of every attorney who had done such acts? True, if a similar penalty had not been previously provided for such acts, the law would be an *ex post facto* law without the provisions of the United States Constitution. Suppose the law had named every attorney in the State, and declared that they were all suspected, and being "suspects," they should forfeit their lands, goods, and chattels, and their licence to practise; would not that be a bill of attainder complete in all its parts? Strike out "lands, goods, and chattels" from the statute, would it be any less a bill of attainder? Strike out the names and insert "every attorney in this State" shall forfeit his licence unless he take his purgation oath that he is an honest man, is it not a bill of attainder, possessing the marked qualities of the English acts of attainder we have cited?

But it is said that the provisions of secs. 3, 6, 9 & 14 of art. 2, above referred to, do not take away nor impair any civilly vested right. Is that so? Suppose a preacher has made a contract to preach to a given congregation for ten years and to serve them as pastor; is that no contract? And if it be a contract, is it not impaired by forbidding one of the parties to that contract to fulfil his obligation? Are the franchises of private corporations civilly vested, and does not a law changing the qualifications of their officers affect the rights of such corporations? Is not a licence to practise law a civilly vested right? What is a civilly vested right but a right recognized by the law? True it is, that it is not every vested right that the States of the Union are forbidden by the Constitution of the United States to impair. They are forbidden to affect vested rights by bills of attainder, *ex post facto* laws, or laws affecting the obligations of contracts.

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No one can honestly deny that a licence to practise as an attorney is made a privilege by the State, and that the privilege is granted to individuals, and that the grant is for life. Is it in its nature revocable at the will of the Legislature? Of course, I do not refer to the omnipotent power of the English Parliament, but to the limited powers of the legislative bodies in this country. I know of no instance of the revoking of the licence of an attorney, in the whole history of the bar of England or the United States, except as the penalty of some offence committed. That fact alone should be sufficient to show that it is not revocable at will.

Is it revocable because it is an office? Not necessarily; for, by the common law, a man may have an estate in an office, as he may have in a dignity or title. It is well known that in England some offices are hereditary, descending from father to son. The barons of England are hereditary legislators (1 Blk. Com., ch. 12; 2 id. ch. 3); they can lose their nobility only by death or attainder—3 Cruise Dig. 116, tit. Officers. Attorneys are not properly called public officers, for they do not serve the State, but individuals. They are sometimes called officers of the courts, but that is, really, a mere form; they do not serve the law, but merely give their assistance to individuals in securing their rights through the forms and in the methods the law has provided, and for this service they are paid, not by the public but by those who employ them. Now it may be admitted, for the sake of argument, that public officers who are employed by the State and paid by the State, who labor for the public and not for individuals, may be removed in the manner the law provides, or by change of the laws, and that because public policy, as manifested by the history of the country, forbids that any one should have an indefeasible estate in a public office; and thus, it may be properly said, that the relation of public officers to the State does not originate in a contract, that they are paid a salary or fees, that they may devote their services fairly to the community which employs them. In this country, public offices have never been considered as resting upon grants, but it is not so in England. The King may grant the office of an hereditary legislator by issuing to any one a patent to nobility, and in all offices held by patent the grantee has an estate.

But still the provisions of the Constitution recognize the rights of parties, the rights of attorneys, and declare that those rights shall be forfeited as a consequence of the acts

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- specified in sec. 3. It imposes the penalty, it inflicts upon him the pain of forfeiture as a consequence of uttering words which were not criminal by any law whatever; as a consequence of doing acts, some of which were perfectly legal. To that extent the law is an *ex post facto* law, and therefore violates the Constitution of the United States.

That punishment and pain is the very object of the provisions is manifested to every fair reasoning mind. Change but the form, leaving all the substance, and it would be so plain that no prejudice could remove the conclusion. Instead of saying that no person shall practise as an attorney until he has taken an oath that he has not done the acts specified, say that every one who has done such acts shall forfeit the rights he previously enjoyed, and the weakest intellect could not fail to perceive that the design was to pain those who had done such acts—to punish them by taking away their means of living.

It was held *In re Attorney's Oath*, 20 John. 492, "that attorneys and counsellors do not hold an office of public trust in the sense of the Constitution of New York," "but that they exercise a privilege or franchise." "They enjoy the exclusive privilege of prosecuting the defending suits for clients who may choose to employ them."

The lawyer's profession is his property—Byrne's Adm'r v. Stewart's Adm'r, Dessaus. (S. C.) 475. In Austin's case, 5 Rawle, Gibson, C. J., says: "An attorney is an officer of the court; his office is one for life; the grant of an office without express limitation, at common law, endures for the life of the grantee."

Notice the decision of Tindal, C. J., upon the exclusive rights of the sergeants-at-law to prosecute in the Common Pleas, notwithstanding the King's warrant throwing open the bar—7 Bing. (N. C.) 235, 187; 10 Bing. 571. "We think the warrant of the crown can no more deprive the sergeant, who holds an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself."

I need not cite conflicting cases or mere opinions relating to an entirely different state of facts. Under the Test Act, 25 Car. II., ch. 2, and the Corporation Act, 13 Car. II., ch. 1, requiring oaths to be taken, it was held that attorneys did not hold such offices or places of trust as to be required to take the test oath.

It is apparent that the special and exclusive privilege

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which the law has given to those who assume the duties of attorney and counsellor, a privilege conferred for life, is such a franchise by the law itself vested that it cannot be taken away except as a penalty for some wrong done, and that penalty to be enforced by due course of law. To deprive a man of his franchises and liberties without just cause duly inquired into, is one of those wrongs which our fathers, when they adopted the Federal Constitution, attempted to prevent. For the State to revoke its grant of lands is an admitted wrong; why is it not as great a wrong to deprive one of a granted franchise, a vested right? I think I have fairly shown that the lawyer's right to follow his profession, after he has received his licence to practice, is a right, a right vested in or belonging to him, a right the law in existence before the the new Constitution was adopted, recognized, granted, and protected; and that if his profession be considered as "*an office*," it is not a public office in which he performs duties for the community without the assent of the individual citizen, which the State may alter in accordance with its judgment; but that it is rather a private office, which he exercises for his own emolument, upon the application of, and for the benefit only of those who choose to employ him. The lawyer, while performing all the duties that any government might have demanded of its citizens during the late rebellion, may have expressed in words his sympathy with those in rebellion. He may, like the great and good Sir Matthew Hale, have been willing to assist in the enforcement of the law as between the State and its citizens, or as between man and man; his judgment may have kept him true to his allegiance, while his feelings may have led him to express sympathy with those in arms, and yet he is to be punished by being deprived of the right to practise his profession. No crime is laid to his charge, no wrong done to the State is preferred against him; but in the utterance of his free thoughts he has dared to say those who administered the public affairs were not entirely in the right, nor those in rebellion wholly in the wrong; that those who had risen in insurrection from following out erroneous political principles were not traitors of the character of those who betrayed their country from lust of gold, or wreaked vengeance for their disappointed ambition by consigning their native land to the horrors and fury of civil strife. And yet for expressing his opinions merely, he is to stand and be adjudged, attainted, and is to forfeit his franchises and liberties. No

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chains are placed upon his body, but the bonds are fixed upon his soul—he is taught that the lessons of his past life were falsehoods—he had thought himself a free man; he finds himself a slave who may not speak but as his masters please—he had thought that he could be punished for no act which a previously enacted law had not forbidden him to do; he finds that innocence is treated and punished as crime—he had thought that he might study to learn and to know the truth, and that to what he believed to be the truth he might give utterance; he finds that he must believe and speak what the majority choose to believe and give permission to say—he had thought that religion was a matter between man and his God; he finds that it is a concern between the citizen and the State, and that he must bow at the image of the Baal of the day. In sadness and in sorrow, mourning over the misguided passion of his fellows, he must commune with his own heart, looking for that deliverance which comes at last to every toil-worn suffering son of earth—assured that truth is not known by counting majorities, and remembering that

“The best of men  
That e’er wore earth about him was a sufferer :  
A soft, meek, patient, humble, tranquil spirit ;  
The first true gentleman that ever breathed.”

was not a favorite of the majority, was attainted, and died.

It may seem to some that these remarks partake more of the character of a popular harangue than of an argument proper to be addressed to a court sitting to decide a case by the rules of law; but it is for the reason that I am addressing judges, who, by their station and their learning and wisdom, are presumed to be capable of understanding the true force of a course of reasoning, that I thus speak. To thoroughly comprehend the true force and extent of the limitations the people of the United States have placed upon those who administer the government, and upon the States also by the 9 and 10 secs. of art. 2, and the amendments to the Federal Constitution, it is absolutely necessary that we know the history and growth of those principles of duty and right, as between the citizen and the government, which have come down to us from our forefathers. Perfect toleration of opinion is not a virtue common to mankind. He only who has learned through how many struggles and contests we have attained the knowledge of truth we now possess; how many martyrs have suffered that we may know the blessings of freedom; how many have toiled on through years of penury

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and unrequited labor, that we may enjoy the results of their struggles, and who loves the truth for the truth's sake, will be tolerant. Do we remember that other men have labored, and that we have entered upon the fruits of their labor? More than two generations have passed from the land since the adoption of the Federal Constitution, and the rights and liberties thereby intended to be secured have become to us like household words, often—often upon the lips, but how seldom reaching the heart or controlling the conduct.

How many of us in reading over the chapter in 4th Blackstone, "of offences against God and religion," have thought of the details of that long record of intolerance and persecution which lies covered up in those few pages; and then, remember that of all the nations of civilized, christianized Europe, in England the fires of religious persecution burned the lowest. Read the statutes passed even since the Reformation, stamped as they are with the spirit of the times, and see how slowly England has learned the duty of tolerance alone; the right of religious freedom she has not yet acquired. Study the statutes of 5 Eliz., ch. 1; 27 Eliz., ch. 27; 1 Jas. III., ch. 4; 7 Jas. I., ch. 6; 13 Car. II., stat. 2, ch. 2; 25 Car. II., ch. 2; 11 & 12 Wm. III., ch. 4; 1 Geo. I., stat. 2, ch. 2, ch. 16, and other laws, and what do we see? Every Jesuit and priest declared a traitor, every one harboring them or attending mass declared a felon, those asserting the spiritual supremacy of the Bishop of Rome attainted of *præmunire*; and forfeiting liberty, lands and goods, their blood corrupted, and their very offspring punished for the offences of their fathers.

Read the history of the strife of factions, and then study their statutes of attainders passed from reign to reign; read the chronicles of our own revolutionary struggles, and study the statutes of attainders and treasons passed by the different colonies, the bitter strife between Tories and Whigs, and Whigs and Tories, and we shall then learn that those who adopted the Federal Constitution, who had come out of the fires of civil war, knew whereof they affirmed when they declared that no bills of attainder or *ex post facto* laws should be enacted by either the Federal or State Governments.

Read the chronicles of England's history from the adoption of the right of petition to the return of Charles the II. to the throne, as the absolute master of the lives and liberties of his subjects, had that careless monarch but possessed the strength of mind and firmness of will of his predecessor, the

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Lord Protector Cromwell. Turn over the pages of Rushworth, look at the ordinance of the long Parliament of April 1, 1643, entitled "An ordinance for sequestrating notorious delinquents' estates," enacting that the estates both real and personal of the bishops named, and of all bishops, deans, chapters, &c., and of all persons ecclesiastical and temporal, who have raised arms against the Parliament, or aided therein, etc., shall be seized and sequestered, and appointing a committee to enquire into and take charge of such estates, and directing also the estates of all papists to be seized—3 Rush. 309. Examine also the oath imposed to observe and keep the Solemn League and Covenant; the ordinances of attainders abolishing the book of Common Prayer and establishing the Directory of public worship. A little further on and, in 1648, one hundred and fifty of the members of Parliament were expelled, the House of Lords abolished, and the minority ruled, and brought Charles I. to the scaffold; and then, for the first time that I can find, was required an oath approving the past acts of the Parliament, and of the execution of the King; an oath which, to his credit be it said, the younger Vane refused to take. (Foster's Life of Vane.) But a very few years later, and the remainder of the Parliament were expelled by the soldiers of Cromwell, and my Lord Protector ruled the absolute master of England, Scotland and Ireland, and for a time there was peace. From Westminster, on December 16, 1653, the Lord Protector issued his declaration, establishing the government of England, Scotland and Ireland, vesting in himself all the legislative and executive power of the realm. That declaration is a curious subject of study—6 Somers' Tracts, 284. It is a fit match for the present Constitution of France. The Lord Protector died, leaving no one capable of filling his place, and with joy and bonfires and illuminations the people of England welcomed the return of the worthless Charles II. to the throne. Twelve years were struck from the statute books of England, and the statute of 12 Charles II., ch. 30, is the attainder of him who had been the Lord Protector, and of the regicides. The ordinance of Parliament had required an oath to support the Solemn League and Covenant; the statute of 13 Car. II., stat. 2, ch. 1, required all magistrates, all holding any office of trust, duty or emolument, to forswear that oath, and to swear that it imposed no obligation upon them; that it was an unlawful oath, and imposed upon the subjects of this realm

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against the known laws and liberties of the kingdom. They were further required, in addition to the oaths of allegiance, adjuration and supremacy, to swear "That it is not lawful upon any pretence whatever to take arms against the King, and I do abhor that traitorous position of taking arms by his authority against his person, or against those that are commissioned by him." Need I cite the "Five Mile Act" of 17 Car. II., stat. 2, ch. 1, in addition to the above oaths, requiring of non-conformists, "That I will not at any time endeavor any alteration of government either in Church or State;" and prohibiting all preaching or teaching contrary to the laws and statutes. See Cromwell's order of Nov. 24, 1655, prohibiting any preaching or teaching by any prelatist, either in public or private, in the family or out of it, and forbidding the use of the book of Common Prayer—1 Neal's Hist. Puritans, 157. The Parliament of Charles II. did not better the instruction; they only reversed the position of the parties.

Nor were our fathers in this country so much superior to the English people, that we can boast of our toleration. Freedom of opinion in this land, what there is of it, has been the growth of the past century. The Constitution of Massachusetts, adopted in 1780, required of all officers the oath that no foreign prelate could have any ecclesiastical or spiritual jurisdiction within the commonwealth, and that oath remained until 1821—Const. Mass. 1780, ch. 6. See also the colonial statutes of South Carolina, Connecticut, Virginia, Maryland, New York, &c. &c.; 1 Hild. Hist. U. S. *passim*, 3; id 383; 1 Randall's Jefferson, 203; Virginia Acts 1659, 1662, 1663, 1705-30, following statutes of Wm. & M.

Not one of the oaths prescribed by the English statutes, that I have read, required the citizen to swear that he had never committed a crime or expressed a sympathy with rebellion—not one required that the officer or the citizen should purge himself of offence, and bear testimony against himself. That is a discovery reserved for our times and our country, and a great invention it is. "Go to," said the Quaker to poor Tray, "I will not kill thee, but I will give thee a bad name," as he turned him into the streets with the cry of "mad dog," and somebody else did kill Tray, and so do the provisions of this new Constitution say: We will not punish treason against the United States or this State, or any other offence mentioned in this long catalogue, but unless thou canst or wilt swear that thou hast done none of these

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acts, we will deprive thee of thy means of living, and thy places of honor and profit held by thee of the gift of private individuals—thou shall not serve at the law, nor receive the profits of its profession—thou shall not minister at the altar of God, nor receive a salary from those worshipping thereat—thou shall not teach the young mind the truth, nor receive pay therefor—thou shalt not direct the business of any private corporation, although its wealth be all thine own. We will not punish thee—we are merciful! But go—we proclaim thee an outlaw, disabled from following thy past calling—we forbid thee earth, fire and water, and commend thee to the charity of some other country in which we wish thee all success. No punishment? I defy the history of the world to invent a punishment more refined and ingenious than to punish a man through his love of truth, his adherence to his word. He will not lie, he will not swear a false oath; no matter how guilty he be of offences, he has a regard for the truth and will not lay a perjury to his soul. It is indeed an ingenious punishment; it dispenses with statutes defining offences and providing penalties therefor; it dispenses with courts, with all their paraphernalia of indictments by grand juries and trial by petit juries, executing the law upon offenders; all that is needed, is, that a law be passed every year or two requiring every citizen to swear that he has never wronged or defrauded any one; that he has never slandered his neighbor; that he has never committed murder, burglary, larceny, adultery or fornication; and if he cannot thus swear, then forbid him to follow any profession, trade or calling, for that will not be a punishment inflicted upon him, but a mere regulation of the trades, callings and professions in the State; and to provide such regulations, the State has a most perfect right; nay, more, it may prohibit them all to non-jurors, and still violate no provision of the Constitution of the United States, nor take away any inalienable right of the citizen. Had the Constitution provided, like some of the English statutes, that of 5 Eliz., ch. 1, that persons refusing the oath should be attainted of a *præmunire* upon the first tender, and suffer as in cases of high treason for the second refusal, that would be a punishment, and the law would be void as conflicting with the Constitution of the United States; but as the penalty does not reach to tangible property, nor actually touch the body, it is to be held no punishment, but a mere regulation of the business affairs of the people. Sirs!

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"You take my life  
When you do take the means whereby I live."

"*Requiscat in pace*" was the parting benediction bestowed by the Inquisitors as they turned away from the brother whom they walled up alive in his death-cell. "Go in peace" is the blessing bestowed upon those who may not swear by all the words of this new evangel of liberty.

HOLMES, Judge, delivered the opinion of the court.

At the December term of the Cape Girardeau Circuit Court, in 1865, the defendant was indicted for unlawfully preaching in said county, "without having first taken, subscribed and filed the oath known as the oath of loyalty, as prescribed and set forth in the sixth section of the second article of the Constitution of the State of Missouri." A demurrer to the indictment being overruled, the defendant pleaded not guilty. Being tried, convicted, and fined five hundred dollars, he brings the case to this court by appeal.

The essential question is that of the constitutionality of the oath.

Several other cases have been submitted, involving the same question in reference to preachers, teachers, attorneys, and persons solemnizing marriages. These cases will depend upon the same reasoning, and it will be more convenient to consider them all together.

When this matter came before the court in the case of *Garesché v. The State*, 36 Mo. 256, and the *State v. Cummings*, 36 Mo. 263, it did not satisfactorily appear to me that the provisions of the Constitution in question could be judicially declared void as being in violation of that clause in the Federal Constitution which prohibits a State from passing "any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." That the provisions excluded these persons from the rights and privileges in question was express and clear enough, but that the thing done was prohibited under this clause was neither express nor very clear. There was no precedent that furnished any near parallel to such a case. No decision of the Supreme Court of the Uni-

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nited States had precisely defined the meaning of the clause, nor limited the extent to which the application of this prohibition might be carried. We had jurisdiction to construe it for ourselves; but it was a settled rule of construction that an express provision of the Constitution should not be declared void, unless the matter were clear beyond any rational doubt. Under this rule, it is conceived, it would have been the duty of this court, even if some doubt had been entertained, to uphold the Constitution of the State until it should be finally pronounced void by the higher tribunal, in which only was vested the judicial power to make an end of the question.

In Cummings' case, 4 Wall. 277, it was decided that this oath of loyalty in reference to preachers, and so far as relating to past acts, was substantially a bill of pains and penalties, and an *ex post facto* law, within the prohibition, and therefore unconstitutional and void; and the same reasoning was applied to the case of an attorney, arising under the act of Congress, in *Ex parte Garland*, 4 Wall. 333. This decision is absolutely binding on this court in that case; it is not absolutely binding in any other case. In other cases, whether the same or similar in nature, and so far as the principles involved are the same, it has the force of a judicial precedent only. No judicial precedent, however entitled to the gravest consideration and respect, is absolutely binding on any court; but when, by a single precedent, or a series of precedents, an adjudication of the court of last resort has become the established rule of decision in that court, the principles involved and determined should be considered by all inferior courts as definitively settled, and they could not wisely be departed from. Where a question of real property had been decided adversely to the opinion of this court, Scott, J., acquiesced in these words: "As this is a question arising under the laws of the United States, and as the highest tribunal known to the Federal Constitution has pronounced its judgment in relation to it, that judgment is obligatory on this court, whatever opinion might be entertained of its correctness"—Ca-

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banné v. Lindell, 12 Mo. 189. It was considered not as directly binding, but as carrying a weight of authority which it would be unwise and useless to disregard. There was no reason to suppose that the decision would be different in another case.

If there were reason to believe that this decision was not really sound law, there might be no impropriety in our refusing to accept it as a controlling precedent. That the court was so equally divided in opinion must necessarily detract much from its weight, but it is still the official judgment of the court constitutionally pronounced. As such, we must consider ourselves in duty bound to follow it, unless convinced, first, that it was against law, and, second, that a different conclusion might, for that reason, be reached in that court in another case. We should not be at liberty to presume any other reason, but we may properly regard this as still open for consideration. If it were necessarily to be regarded as final, it would be proper to yield our own judgment altogether (if adverse); for there must needs be a final determination somewhere: *interest reipublicæ ut sit finis litium*.

In the cases of Blair v. Ridgely and State v. Woodson, the majority of the court held that this decision was not decisive of the case of a voter or office-holder. I did not deem it necessary to give an opinion on the constitutionality of the oath in those cases. Nor is it necessary that I should consider, here, whether there be any or what grounds of distinction, which may take those cases out of the reasoning on which this opinion proceeds.

If it were clear that the precedent should be regarded as established in reference to the cases now before us, we might rest our decision on that authority alone. But a precedent is only evidence of what the law is. Other cases may involve a new application of law to facts. We are to decide every case according to law, upon all precedents and principles together. If we accept the precedent as authority, with or without a discussion of the reasons on which it rests, we

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must thereby admit it to be law for these cases. I conceive it to be proper, therefore, that I should re-examine the subject as briefly as possible (considering its inherent difficulties), and rather for the justification of my own conclusion than as furnishing a guide or a light to others who may be more capable of judging the question for themselves.

These persons were entitled to the benefit of the legal presumption of innocence, in conformity with those great principles of public law which constitute a part of the law of nations governing the case of civil war, the authority of which I suppose to be recognized by the Constitution of the United States—1 Kent's Com. 1; Wheat. Elem. Int. Law by Dana, ch. 1, §§ 9-15, n. 32 on p. 84, n. 153 on p. 374; Prize Cases, 2 Black, 635; 1 Greenl. Ev. § 5. To the extent to which this law may have force and application here, it is a law superior to the Constitution of this State. According to this law (Vattel, bk. 3, ch. 18, §§ 291-4, & bk. 4, ch. 2, § 20), when a civil war ends by the submission of the rebels, "it becomes necessary to grant an amnesty where the offenders are numerous," and "when the amnesty is once published and accepted, all the past must be buried in oblivion; nor must any one be called to account for what has been done during the disturbances," and "the sovereign, whose word ought ever to be sacred, is bound to the faithful observance of every promise he has made, even to rebels"; but he may except from the amnesty the authors of the disturbances, the leaders of the party; he may bring them to a legal trial, and punish them if they be found guilty; but "the end of peace is to extinguish all subjects of discord." An amnesty is "a perfect oblivion of the past," and, subject to the exceptions, the amnesty exists even without a treaty, and, "by the very nature of the peace, is necessarily implied in it," and "peace restores the two nations to their natural state." The military government may continue until the regular civil authorities are fully established, but the amnesty must be made effectual. An amnesty for prisoners of war may have been involved in the surrender of the rebel armies, and it had been

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proclaimed for others (with exceptions) when this Constitution was adopted.

These doctrines are certainly consonant to reason and the nature of things. It would manifestly be impracticable to punish all, and absurd to attempt it. The mass of offenders must be pardoned, and when pardoned their past offences must be buried in oblivion. Those who were citizens, and became rebels and criminals in law, are thus restored to their former state and condition of citizenship, and must be henceforth presumed in law to be innocent like all other persons, until convicted of some new offence. They return to allegiance and to obedience to the laws. Allegiance and citizenship are reciprocal and correlative obligations. They are entitled to the common benefit of the laws and government that are established, and to nothing more. Nothing more can be required of them by the civil state; and it must be admitted that their opinions and feelings, when not put forth in any new act of resistance to the laws, belong to themselves, and cannot, with reason and justice, nor lawfully, be punished as if they were offences against law.

It is unquestionable that the right of trial by jury in any criminal case, and the presumption of innocence involved therein, is protected by the Federal Constitution, and could not be infringed by a State.

The next thing to be clearly ascertained is, what were these rights to teach, preach, practise law, solemnize marriages, &c., and what was really done, with respect to them, when the new Constitution was ordained.

I premise that natural rights, merely as such, do not fall within the domain of civil jurisprudence: they belong to the *forum* of nature. They are doubtless highly important, and, for anything that we may judicially know, ought to be *inalienable*; but perhaps, in point of fact, they are not; for in the *forum* of mere nature there is no tribunal to adjudge, no sanction but the eternal justice, or the right of might, and no execution but the vengeance of Nemesis—1 Black. Com. 138; 2 id. 18; Kant's *Metaphys. of Eth. & Law*, (Edinb.,

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1836). We sit here in the civil *forum*, and we are to adjudicate upon civil rights, under the established government, and according to civil laws; and if any of these things were civil rights, they must have been created such by the laws and government of this State, or of the United States.

Natural rights, I take it, are raised into civil rights by the established government and laws, and civil rights are such only as they are so created, defined, secured, and made to be, and nothing other. The civil rights which are thus given and secured constitute civil or political liberty, which is never anything else. Civil and religious liberties are political rights, says Mr. Justice Catron—*Permoli v. Municipality*, 3 How. (U. S.) 610. Vested rights of property or contract, when they exist by law, are recognized as civil rights by the clause relating to the obligation of contracts, and are protected as such. None of these things were such vested rights: I do not understand that it is claimed that they were. They were not of the nature of property or contract at all. The right to "life, liberty, and property" (that is, personal security, personal locomotion or freedom from arrest, and private property), where it exists, is protected by the Federal Bill of Rights from being taken away, in any criminal case, without due process of law—Const. U. S., Amend. Art. V.; 1 Black. Com. 128; Sto. Const. § 926; Smith's Com. § 593. So far as these things were of the nature of such rights, they either did not exist in these persons, or, if they existed, they were not taken away. I suppose it is not contended that they were, unless the penalties consequent upon a violation of the Constitution may be said to have that effect when enforced. No other clause of the Federal Constitution is referred to, and I presume none can be cited, that undertakes to make any of these things civil rights. It must follow, then, that if they were such rights, they owed their existence as such to the Constitution and laws of this State, and to no other civil power, and were a part of the civil liberty thereby established.

It may be admitted that all these positions, functions, and

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professions, were naked civil rights in this State, under the old Constitution. That the right to practise law, or solemnize marriages, was created and defined by the Constitution and laws then in force here, and by no other civil authority, can scarcely admit of question; and that all the rest were to some extent defined, and secured or protected, and thus made civil rights so far, by the same power and laws, would seem to be equally clear. They were of such a nature as very nearly and greatly to affect the good government and safety of the State, and they were an important part of the rights and liberties of the people. They existed under the old Constitution, and they would exist under the present one if the special provisions in question were abrogated or declared void; and they were taken away only by a change in the Constitution itself.

All these things were thus clearly matters of internal government and civil institution in this State. The old Constitution gave the people power to alter or abolish their Constitution, and, in so doing, to abrogate or revoke these naked civil rights, as they might deem fit and necessary for the common safety and happiness of the body politic. The Convention was expressly directed to frame such a constitution as might be "by them deemed essential for the promotion of the public good." Their power to give or withhold, to abrogate or modify, these civil rights, for purposes of good government, was unquestionably sovereign and absolute. The prohibitory clause was not in itself a limitation on the exercise of this power for this purpose. It would be purely an exercise of the political power, wherein it was sovereign and unrestricted. As to these persons from whom these particular rights and liberties were taken away, or to whom they were not given or secured, it was in one sense a deprivation of civil rights, and in every sense a loss or diminution of civil liberty. In the first place, it would not be quite correct to call this a deprivation of rights, or certainly not in any sense of punishment: more properly it would be said that all persons within the State surrender for the public good so much

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of their natural or civil rights as the majority, when establishing a new government, may deem fit and necessary that they should surrender for that purpose, when no higher authority intervenes; and this is wholly a matter of political wisdom. In the second place, it is perfectly plain that if such deprivation of rights were necessarily to be regarded as punishment, the Constitution could never be altered, amended, or abolished at all, nor the laws changed otherwise than by enlarging these rights and liberties for everybody; and this would be next to impossible. So far it must be admitted that the question is wholly political, and not judicial, in its nature.

A judicial question can arise here only by finding some higher positive law by which the sovereign power of the Convention and people was restricted. It is not claimed that such superior law can be found anywhere else than in this prohibitory clause, nor in that, unless these provisions can be held to change the criminal law, or the rules of evidence, in relation to past acts, or can be declared to be a legislative sentence of punishment for supposed criminal offences, or past conduct assumed to be criminal; and whether the enactment were this thing (raising a judicial question), or that other (raising a political question only), must necessarily depend upon the object, scope, and intent of the act itself. If the operation and intention were to punish these persons for such past conduct as criminal, I suppose it might be said to be a bill of pains and penalties; but if it were really, by scope and intention, a measure of political wisdom only, looking to the good government of the State, however mistaken in policy, and neither designed nor declared as punishment at all, I do not see that it could be rightly called such a bill.

It appears to me that any *ex post facto* elements which might possibly be found in it, may be considered as merged in the graver character of a bill of pains and penalties. For if the administration of the oath could be regarded as the criminal proceeding to which these elements relate, it would still be the enactment itself, if anything, which changed the

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law of crimes, or the rules of evidence, retrospectively ; and if it be a bill of pains and penalties, it must be the enactment itself which assumes judicial magistracy, weighs the offence and the proofs, decides upon the political necessity and moral fitness of the penal judgment, declares the guilt, and fixes the punishment.

The requisition of the oath can be no more than the execution of the sentence. No other trial or criminal proceeding than that which may be found in the act itself could possibly have been contemplated. The administration of the oath is in itself, I think, clearly a civil proceeding only ; but as a mode of executing sentence it may be considered as a part of the legislative judgment. The criminal proceeding, then, must lie in the force of the enactment, or there is none at all ; and without some criminal proceeding, or some decisive penal character, I do not see that it can by any possibility be an *ex post facto* law in the sense of jurists. If it be a bill of pains and penalties, that is enough. By no construction, it seems to me, can these provisions be an *ex post facto* law, or necessarily punitive in character, without being also a bill of pains and penalties ; and, to my mind, if it be not the latter, it is neither. In order to make it such a bill, it would seem to be essential that it should punish a past act as *criminal*—*Calder v. Bull*, 3 Dall. 390.

Ordinarily the word *bill* or *law* would import an act of the Legislature ; but in civil jurisprudence an ordinance or constitution of the supreme power in the State would be considered, I presume, as an act of legislation. I suppose, then, that these words may include this Constitution. Such bills in England were acts of Parliament. The power of Parliament was more nearly that of a State Convention with us than that of a Legislature sitting under a written constitution ; and if by any latitude of construction this clause can be applied to conventions of the people assembled for the purpose of founding a new constitution of government, it would seem to be reasonable that the intention to enact such bills should be unequivocal and clear.

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There is a class of cases in which acts of the Legislature have been tried by the supreme law of the Constitution (State or Federal) under which the Legislature sat, and been held void as being of the nature of punishment without trial, because the Legislature, in such case, had no power to divest civil rights, vested or naked, which were by such higher authority secured against legislative action in any other way, or for any other purpose, than as a penalty for crime to be imposed on judicial conviction—*Taylor v. Porter*, 4 Hill, 140. Such was the case of *Fletcher v. Peck*, 6 Cranch, 138, where a vested right of property was taken away by an act of the State Legislature, which had no power to do such a thing otherwise than as a punishment on conviction. It was therefore necessarily to be inferred that it was done for punishment, because it had that direct effect; and, being done by legislative act, and not by judicial sentence, it was held to have the operation of an *ex post facto* law, punishing the party for the supposed offences of his grantors. It was necessarily equivalent to punishment without trial. No other purpose could be alleged or heard. Such deprivation of rights as this, I should readily admit, could be regarded in no other light than as punishment in the legal sense.

Before these cases, or this principle, can have an application here, it must be shown that this enactment was, by the same or some like reasoning, necessarily equivalent to punishment for past conduct. The prohibitory clause may be considered as excepting out of the absolute sovereignty of the Convention all power of depriving persons of civil rights, as and for a sentence of punishment, without trial, or in a way that changed the criminal law, or the rules of evidence, retrospectively.

One view says that the Constitution was ordained in political wisdom for purposes of good government, with no object or intent to punish these persons for supposed criminal offences, and that it came therefore within the civil power wherein it was absolutely sovereign: the other view says that by the very scope and intention of the enactment itself it did punish

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for such past conduct, and was a legislative sentence without trial for the treasons and other assumed offences involved in the acts specified. On this issue the whole matter turns. Which view is the correct one?

It does not appear by the tenor, nor in any other way, that the Convention had no power to divest persons of these naked civil rights otherwise than as a penalty for crime on conviction. It is not, then, upon this ground, necessarily equivalent to punishment, and it is not, therefore, for that reason necessarily to be regarded as punishment. It is obvious that the question here must depend wholly upon what was the direct scope, object, and real intention of the act. If it were simply a measure of political wisdom, for purposes of good government, it was a matter within the sovereign power, and valid beyond the reach of judicial condemnation. To bring it within the definition of such bills and raise a judicial question on this prohibition, it is absolutely necessary that it should be such by the very scope, operation and intention of it. I see no other legitimate way of showing that it can be regarded in no other light than as punishment.

In what manner is this to be determined? And, first, what tribunal is to decide what is a measure of political wisdom, and what are purposes of good government? I must answer, the people in Convention assembled, absolutely for themselves. And, second, who is to decide whether this enactment was such a measure or not—whether or not it was, in its actual effect and real intention, not such a measure at all, but an *ex post facto* law, or a legislative sentence of punishment? Here I must answer, the court sitting in judgment upon this judicial question. It is to be determined according to the established rules of construction, among which I find these: that the object of all rules and maxims of interpretation or construction is, if possible, to discover the *true intention* of the law; that the intention must prevail over the literal sense of terms, and “is to be taken or presumed according to what is consonant to reason and good discretion” (1 Kent’s Com. 462; Smith’s Com. § 515-45; 1 Dom.

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Civ. Law by Cush. 118-25); that we are look to the nature, object, scope and design of the act, and give to words such operation as may fairly secure the ends proposed (*Prigg v. Com. of Penn.*, 16 Pet. 610; 1 Sto. Com. § 405, 405 *a.*); that where the words are express, the meaning clear, and the intention well known, it must govern, however unwise the law may seem to be (*Smith's Com.* § 501, § 465); that if on the face of the enactment this intention be doubtful, we may look into the attending circumstances and condition of the people, into matters of public history affecting the whole people, and public matters affecting the government of the country (1 Greenl. Ev. § 5); but if the intention of the law be plain and intelligible, we cannot allow ourselves to find in any reference to extraneous matters any authority for interpolating either a grant of power or a restriction on power granted (*Hamilton v. County Ct.*, 15 Mo. 23); that in case of implied limitation or prohibition of power, it is not sufficient to show a possible or potential inconvenience, but there must be a plain incompatibility, repugnancy, or an extreme practical inconvenience leading irresistibly to the same conclusion (1 Sto. Com. § 477); that we are not to substitute other language, nor our own notions of what the framers intended, but are to seek for the thought which is expressed; that it is not the intention of the members which is to govern, but that of the law which they have enacted; and that the legislative body must be understood to have employed words in their natural sense, and to have intended what they have said (*Gibbons v. Ogden*, 9 Wheat. 188; *Fletcher v. Peck*, 6 Cranch, 130; *Newell v. People*, 3 Seld. 97; *Sedgw. Stat. & Const. Law*, 246); that we are not to lose sight of the instrument itself, nor look beyond it "and roam at large in the boundless field of speculation," where it is plain and explicit and can mean but one thing (*People v. Purdy*, 2 Hill, 36); that it cannot be presumed to admit of any recondite meaning or any extraordinary gloss (1 Sto. Com. § 451); that the whole must be taken together, and, if possible, reconciled into harmony

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(Sedgw. 237; 1 Sto. Com. § 455); and, finally, that the clear scope, object, effect, and intention of the law, as made, must govern absolutely, and cannot be overborne nor evaded by judicial construction.

There is no case here for the interpretation of the meaning of words: there is no ambiguity in the language. The only question there can be is, what was effected, and what was the object and intention of what was so done? The intent of the law is to be gathered from the enactment itself, and that, when ascertained, must be presumed to have been the intention of the legislative body. The motives, objects, and reasons of the members are not in question; they are not examinable in a court of justice; and neither their motives, however patriotic or corrupt, nor their reasons, however sufficient for themselves, or insufficient for us, can be allowed to change the nature and effect of the law which they have enacted—*Fletcher v. Peck*, 6 Cranch, 130. Even where it is permissible to look into the extraneous matters, it is not the intention of the legislators, but that of the legislative body as embodied in the enactment, which is the subject of inquiry.

Penal acts usually prescribe the penalties for criminal offences with express clearness and precision. The known examples of bills of this nature contain bold, explicit, and unmistakable declarations of the object, the punishment, and the persons. The precedents of *ex post facto* laws admit of no other rational construction. Deprivations, disqualifications and disabilities of this kind have often, in the history of penal legislation, been thus prescribed by law as a punishment for crime; and when so declared, in whatever form, they are doubtless to be regarded as punishment in the legal sense. There is no such explicit declaration here: if there be any at all, it must lie in the effective operation. It must be presumed that the intention was to do what is actually done, and this is to be found in the operation and effect of the act. What, then, was done? That all these persons were absolutely excluded from the exercise of these privi-

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leges, offices, places and functions, and deprived of civil rights which they had previously enjoyed, is certain enough. This portion of their civil rights and liberties was taken away. There is certainly no defining of qualifications or disqualifications of these persons for any of these things: as to them, it is clearly at one sweep an absolute exclusion. I believe no one has ever denied this. The oath is not directed for this purpose: they are all forbidden to take it under the penalties of perjury. None of them could take it, and it was clearly not intended that they should. It is only the other portion of the people, who were not deprived of these rights and liberties, who are to take the oath, or do these things at all; and it is plainly required of them only for the purpose of ascertaining that they belong to this class, and possess the rights and liberties. All this was intended by the act itself to be done. This the Convention plainly intended to do; and this unquestionably it had the sovereign power to do for the purposes of good government, and with the object of securing the well-being and safety of the State. It is equally clear that it had no power to accomplish such objects and purposes by means of an *ex post facto* law or a bill of pains and penalties.

The expressly declared object of the whole instrument was "the more certain security of our liberties and the better government of this State." There is no good reason for doubting that this was the general object and purpose of the Convention. It would neither be reasonable, nor according to the rules of construction, to presume that the law was aimed at these persons *as criminal offenders*: such aim must be found in the provisions of the act if anywhere.

The most favorable view I am able to find in support of the enactment may be stated thus: it may be said that these persons out of the whole community were to identify themselves by their own knowledge that they had done some one or more of these acts, not that the acts were therein regarded as crimes, however they might be found to be such on a judicial trial, but that the persons who had done the acts,

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whether criminal or not, were deemed, in the political wisdom of the Convention and people, for the time being, not to be safe and suitable persons to have and enjoy these rights, or be entrusted with places, privileges and functions that so nearly affected the well-being and safety of the body politic; that the criminality of the acts was in no way adjudged, nor passed into a sentence of punishment; that the oath merely ascertains who have these rights and liberties, but not the guilt or innocence of those who have them not; that it was aimed at a portion of the inhabitants with a view to the actual condition of the State and people, and with reference to their future safety and well-being, and had no object or intent to punish them as criminals; but that their having done these acts, their notorious disloyalty under the old Constitution, and their well known abuse of these rights and liberties when they had them, were, not a reason why they were deemed guilty of offences for which they were punished, but a well grounded and just cause why the civil power in its wisdom judged it necessary, wise, and fit, for the future safety and good government of the State, that this description of persons should be thus excluded, for such time as the State might think prudent, from this part of the common rights and privileges of citizenship.

It might be said that this purpose was further manifest in the provision made for enabling the Legislature alone, after a certain time, to repeal these special clauses and restore these persons to full and equal rights; wherein it is indicated that the object was not to punish them, however culpable, but to secure the peace, order and safety of the whole; and that all this was a matter of political judgment over which the courts have no control. If this view could be justified, it would be clear that the question would be wholly political and not judicial in its nature; and the matter would fall within that class of cases in which it is held, that, for any wrong or injustice done in the exercise of the political sovereignty, there is no remedy but in an appeal to the political constituencies.

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This reasoning would assume that the past acts were not the reason of the deprivation or exclusion, but a reason why the enactment had become a necessary measure of political wisdom. Any other view might seem to imply that the Convention had forgotten its duties, and insidiously set about finding out a way of evading the Federal Constitution, and inflicting penalties upon persons who were to be presumed to be innocent of everything criminal, and whom they presumptively knew not to be punishable without trial for their past offences. To impute any such lurking intention to the Convention would certainly be unjustifiable. There is no need of that. We are not to look beyond the enactment itself; nor is there any occasion to search for any extraordinary gloss beyond its obvious effect and necessary operation.

It is indisputable that the exclusions and disabilities refer directly to the enumerated acts. The oath expressly relates to them. The acts are plainly the immediate reason and sole ground of these special provisions. It may reasonably be said that in them it is virtually assumed that all these persons had done some one or more of these acts, of which some were manifestly crimes, and all are dealt with in the same way as if they were of like nature (and that large numbers were guilty in point of fact was not only true, but well known to almost everybody—not, indeed, by legal proof on trial, but by general information), the truth of which assumption they were obliged to confess by the impossibility of their taking the oath; thus (as it may fairly be said) effectually changing the rules of evidence, and subverting the presumption of innocence retrospectively in every individual case, contrary to right reason, the law of nations, and the national right of trial by jury in criminal cases; and they were thus effectually deprived of these rights and liberties, and for that reason. The only condition allowed for escape was the oath known to be impossible for them. The persons to be affected are thus sufficiently designated for all the purposes of visiting the deprivation on them with inevitable certainty. The deprivations are in themselves of such a character, that, if

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they had been expressly declared as and for a penalty for crime, or for any of these acts, they would have constituted indisputably a severe degree of punishment. The operation of the law enacted, upon them, is really just the same as if it had been so expressly declared. It may justly be said, therefore, that the declaration as and for punishment for these acts as criminal is actually involved and contained, and is necessarily to be implied, in what is enacted. This whole import is really there by the natural and obvious sense of the language, and by the necessary operation and effect of the law, though not expressed in set terms. It must be presumed that the legislative body intended to do what is actually done, and that would seem to be, essentially, nothing less than a legislative sentence of punishment for past conduct as criminal; and so it may be concluded, that the act itself assumes judicial magistracy, weighs the offence and the proofs, decides upon the necessity and fitness of the penal judgment, assumes the guilt, ascertains the persons, and declares the punishment. It is thus shown that the act itself alone is necessarily equivalent to punishment, and comes within the principle of such bills. As such, it must be held to be an exercise of the civil power of the State, not wherein it was sovereign and absolute, but wherein it was limited and forbidden.

Comparing these views, it is evident that the one looks to the object and intention more especially in the political bearing, the other in the strictly legal; the one considers the operation of the law upon the whole body politic in reference to good government, the other its special operation upon these persons with reference to their personal rights and liberties; the one follows the political reasons, the other the legal principle; the one regards rather the intention of the Convention, the other that of the law which was enacted; the one the general, the other the particular intention. In the judgment of the former view, the conclusion of the latter appears to be based upon a consequential operation and a remotely punitive character argumentatively drawn out,

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and not upon the meaning of language, nor upon the obvious and direct effect of what is said and done, nor upon the true object and intention of the enactment at all, which, under the rules of construction, was the very thing to be discovered; and it supposes the true intention to be inferred by the other, not from anything contained in the act, but from the argumentative deduction of a resulting penal consequence of a general nature, which is confounded with legal penalty, and therefore assigned improperly as the true object, scope, and intention of the law.

It seems to me that the real question must turn upon the consideration whether the more general, or the special and particular, operation and intention are to govern in determining what is to be considered in law the true ground, reason, and nature of this enactment. If the former is to govern, then it would be plain that the punitive character would be only a remote consequence and an inferential result, but not the real object, operation, and intention of the law; but if the latter is to prevail, then the political object is to be held subordinate, or left wholly out of view; the purposes of good government could no longer be allowed as the true object and intention of the law as made; the question of the intention would have to be confined to what is said and done with regard to the individual rights and liberties of these persons; and the latter view, which regards the act as essentially penal in its operation on them, as necessarily punitive in character and a sentence of punishment for past conduct as criminal, must prevail; and it might justly be said that it could be regarded judicially in no other light.

The decision of the Supreme Court of the United States holds that such is the essential nature and character of the enactment within the meaning of the prohibitory clause. I must concede that I have been unable to find satisfactory grounds on which I could venture to deny the reasonableness of that opinion, or refuse to accept it as an authoritative precedent. Such being the character of the act, the prohibitory clause is itself the supreme law by which it is to be

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judged and condemned. It is thereby taken out of the category of a measure of political wisdom for purposes of good government.

Under the proper rules of construction; the judicial mind, I think, may reasonably conclude that such was the real nature and intention of the law, as it stands enacted, whatever may have been the intentions of the legislators. It is probable that they considered the matter in its political bearing only. The politic reasons may have been very just and sound; but no reasons of policy whatever can be heard in support of a law which the Convention was prohibited from passing for any purpose, and had no power to enact. Neither can it be presumed that the Convention considered these past acts only as a reason which rendered these persons unfit for citizenship, or incapacitated them for the further exercise of these civil rights and functions in the State. Such a presumption would not be consonant to reason and sound judgment: it would be in conflict with the law of nations and those fundamental principles on which our systems of government are founded. The rules of construction will not allow such reasoning to be imputed to the legislative body. Nor is it necessary to suppose that the members actually thought of punishing these persons in this way, nor that they were at all aware that they were enacting a bill of attainder or an *ex post facto* law. It may reasonably be inferred that they had overlooked the penal aspect of the matter, as well as the bearing of this clause upon it. At all events, it is necessarily to be concluded that they had fallen into some misconception of their lawful powers, or of the legal operation of the provisions which they adopted. Nor should there be anything wonderful in this, when the question has perplexed and divided the most learned jurists.

If the public good could be regarded, judicially, as the sole ground, real object, and true intention of the law as made, then it might be nothing to the purpose that the consequential result and remotely punitive effect upon these persons were really just as severe as if a bill of pains and penalties

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had been enacted against them. There can be no doubt that upon a change of the Constitution, such rights and privileges, being inconsistent with the new government, may be abolished—*Terrett v. Taylor*, 9 Cranch, 51; *In re Lee*, 21 N. Y. 12. There have been many instances, in several States, where public offices and private rights of this nature, and of great value, have been annulled by such ordinances—*Butler v. Pennsylvania*, 10 How. (U. S.) 415; *State v. McBride*, 4 Mo. 303; *State v. Bernoudy*, 40 Mo. 192. The laws are abolished, and the private rights, which depended on them for their existence or continuation, are thereby annihilated, for such reasons as may seem good to the State. It has always been considered as done for purposes of good government and as a matter of civil institution. The reasons are not usually given in such ordinances, nor is it supposed that they could be made to appear by any reference to extrinsic matters. Even if there were some reason to believe from anything contained in the act itself, that, aside from the public good, some reference was had to past conduct of the persons concerned, or even to acts which might be criminal in their nature, it is not to be supposed that the courts could assume that the thing was done on account of such past conduct rather than for the purposes of good government, unless it were so declared in the act itself in plain terms, or by actual import and necessary implication; nor that an argumentative deduction of a resulting punitive effect upon the sufferers would be sufficient to make the act a bill of pains and penalties. Such reasoning might take a wide range, and if there were no limit to the latitude of construction there might be danger that the control of the people over their own Constitution and laws would be surrendered to another power. It would not be true that such remote consequential result could be regarded in no other light than as punishment; it could be, and no doubt ought to be, in such case, considered only as the ordinary and unavoidable effect of the exercise of the political power for the public good, and in reference to the individuals as a surrender of rights and privi-

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leges for the good of the body politic. It is not believed that any such remote result would make an act a bill of attainder or an *ex post facto* law. It is not enough that it should incidentally partake of the character of such bills: it must actually be such a bill or law. In order to make it such, I should say it must be so, either by the natural and obvious sense of language, or by the direct scope, necessary operation and true intention of the law as it was enacted, admitting of no other rational construction, capable of correct explanation upon no other principle, resting not upon slight implication, but upon actual import and necessary implication; not upon potential inconvenience and vague conjecture, but upon a strong conviction of incompatibility, of plain and irresistible repugnancy, and being "a clear unequivocal breach of the Constitution, not a doubtful and argumentative implication;" for, by all principle and authority, it is in such case only that an act of the Legislature, or the Constitution of a State, is to be judicially declared void as being in conflict with the Federal Constitution—*Fletcher v. Peck*, 6 Cranch, 128; *Dartmouth College v. Woodward*, 4 Wheat. 625; *Cooper v. Telfair*, 4 Dall. 14; *Butler v. Pennsylvania*, 10 How. (U. S.) 415; 1 Sto. Const. §§ 416, 447.

When deprivation of civil rights is prescribed by law as a penalty for criminal offences, on conviction, it is done for the reason that the public good requires it to be done. This is a thing which the Federal Constitution does not forbid; it is only the imposition of a criminal penalty otherwise than upon trial by jury that is prohibited; and it might be supposed here that these persons were subjected to exclusions and disabilities for that same reason and by virtue of the same authority. It is very probable that this consideration had its weight with the Convention; but they have, in express terms, embodied these past acts of a criminal nature in the enactment itself as the immediate and plain reason and sole ground of the law enacted as against these persons, and in reference to the private rights of which they were deprived. The oath and other special proceedings touching

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these persons directly relate to these acts as their immediate ground and reason, and they are subjected to the deprivations for that same reason, whatever other reasons there may have been. This being so, it is nothing to the purpose that the political reason for passing such an act was the public good. The act which is passed is penal in its own nature ; it is such by its own actual import, and therefore by necessary implication ; and the penal law is carried into execution without trial : whence it is clearly manifest that the civil power was exercised, in this, not wherein it was sovereign and absolute, but wherein it was restricted and forbidden.

If the true intention could be considered so far doubtful as to warrant us in looking into the extraneous history for further light, and it were at all allowable (as it is not) for us to inquire into the motives and reasons of the legislators, it would no doubt appear that they thought only of good government and the public safety, and had no idea of inflicting punishment on culprits whose crimes, if punishable at all, might be capital offences. Nor are these disabilities to be regarded as punishment in addition to the penalties of treason ; for whatever they are they fall upon persons whom the law must presume to be innocent of criminal offence, and who might not be punishable even for their past treasons. The extraneous history would not show that the enumerated acts were not the true ground and reason of these special provisions : it would reveal no more than that the acts may have been considered, in a politic view, as a sound and just reason and a good cause why this Convention had become a political necessity, and this enactment a just measure of political wisdom and a prudent foresight (as in that view it may very well have been) ; and in this same aspect it might with reason be said that the reference to the acts was merely for description of the persons excluded, and that the oath was purely a civil proceeding within the authorities—*Watson v. Mercer*, 8 Pet. 110.

But if there be any force in what has been said, this law as made is essentially penal in character, is necessarily equiv-

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alent to punishment in the legal sense, and is a law which by its own force declares and executes the punishment. In such case, I must admit that no one can be heard to say, not even the members themselves, that the intention was not to punish these persons for those past acts as criminal, but only to found a good government and secure the safety of the State; for the saying would be of a matter extrinsic, and would contradict the proper scope, operation and effect of the enactment itself. Though it might be gathered from the general tenor and purposes of the Constitution that they honestly believed they had the power, and deemed the measure just and necessary (as it might well seem to be in a political or moral point of view), yet it must be apparent to the judicial mind that the thing done was prohibited, and they could not be listened to; for no citizen, not even a rebel restored to citizenship, could be deprived of his civil rights and liberties in that way and for that reason, even for the public good, either on account of his crimes, his moral character, or his opinions merely. It would clearly subvert the national right of trial by jury and contravene this prohibition. A government so proceeding might be a good despotism, but certainly a very bad republic; and hence the reason of the prohibition. The court must see therein the operation of mistaken views of political necessity or expediency, unreasonable fears, or ungrounded suspicions, directly overriding a positive law—Sto. Const. § 678. It is not possible to render rebellion forever impossible any more than murder; and the government must be presumed, in legal theory, to be always capable of punishing crime by due course of law, and of putting down rebellion by force of arms, whenever it shall raise its head: *in rege, qui recte regit, necessaria sunt duo hæc, arma videlicet et leges.*

It may fairly be concluded that the provisions come within the rule that would authorize the court to declare them void; that the thing admits of no other rational construction, and rests not upon slight implication, but upon actual import and necessary implication—not upon argu-

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mentative deduction merely, but upon "a clear and strong conviction of incompatibility," and is on the whole (what the precedents would require it to be) "no doubtful case." The higher tribunal has in effect so declared. I am not so clear to the contrary that I can venture to gainsay the correctness of that decision.

I must admit that these exclusions are not of the nature of qualifications at all; and the reason is, that they are not really intended as general laws nor as a permanent institution, either with reference to the fitness of these persons for these special duties and functions, or with reference to the public safety in any proper sense, but are temporary disabilities imposed on a class of persons on account of their reprehensible past acts and their apprehended future bad conduct. That they were to be temporary only is sufficiently apparent from the tenor of the Constitution; for though they might continue in force indefinitely, if not repealed by the Legislature soon after the time limited for that purpose, it was nevertheless plainly contemplated that they would be repealed after a few years. They were not expected to remain a permanent part of the Constitution, and were evidently not intended as a perpetual regulation. In this respect they are clearly distinguishable from those general laws and permanent institutions of government which are really intended to have an equal bearing upon the whole community, and upon each individual so far as in the nature of things they may be applicable to him, and which exclude naturalized citizens, denizens, women, superannuated men, minors, negroes, Indians, and the like, from certain political powers, public offices, or civil functions. This exclusion is plainly founded upon natural, inherent and permanent incapacities, and looks only to the first necessities of good government. Such laws are consonant to reason, and are, in truth, wise, necessary and just measures of political wisdom. They are clearly not of the nature of punishment; they are in no sense penal enactments; and they fall therefore within the unrestricted sovereignty.

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That the Constitution effects a serious loss or diminution of civil liberty in all these persons, and that the deprivations and disabilities operate upon them as a severe punishment in a general sense, no one can entertain any doubt; and if they were declared by law as a part of the sentence on conviction for criminal offences, every one would concede that they would be a heavy punishment in the legal sense. If there were no limitation on the civil power of the State that could save these rights and liberties out of the absolute sovereignty of the people in Convention assembled, this result, however severe or well deserved, could be regarded only as a loss of civil liberty, for which there would be no relief but in an appeal to the people for a change in the Constitution. The existence of such superior law depends upon the construction to be given to this prohibitory clause. Its application here depends upon the operation and intention of this special enactment. The vital turning point would seem to lie in the question, whether the deprivations and disabilities are therein declared as and for a penalty for past acts assumed to be of a criminal nature. This declaration is certainly not made in express words, but it may fairly be said to exist by necessary implication. The decision in question is clearly to this effect. I am not prepared to say that it is not sound law, a proper construction, and, on the whole, the better opinion.

The matter is to be considered here as a judicial question only; and it can make no difference whether the subject be viewed with reference to the present time, or with reference to the state of affairs which existed when the Constitution was framed. Then the civil war had not come to an end; the amnesty had not been proclaimed; a large part of the State was still the scene of strife, and the disturbances had not wholly ceased when the Constitution was adopted. These powers, offices, and functions, had been made an instrument of sedition, and a means of aiding rebellion. They were of such a nature as largely to admit of a dangerous influence in the future. It was doubtless contemplated that some time would be required for the restoration of peace and public or-

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der. It might be difficult for any one to say that all apprehension was groundless; that this measure was not a wise and just political foresight; or that there was any intention to trample upon the rights of innocent persons. These things were matters of political judgment: they do not touch the legal question. Nor can we listen to arguments founded only upon the natural justice or injustice of such legislation, nor to historical examples of prodigious oaths: such considerations would more properly be addressed to the political constituencies. If the judiciary could hear them, they might possibly conclude that treason, rebellion and disloyalty to a just government were still more enormous, and that in the establishing of a new Constitution the safety of the people was the supreme law.

It has been argued, too, that if the opposite party should get control of the State, nothing could prevent them upon any other construction from subjecting all the advocates of this oath to like deprivations in the same way. This argument also has two aspects: the one political, the other judicial. In the broadest political statement, I suppose it would stand nearly thus: that because the patriotic and loyal portion of the body politic, when they had the power, had endeavored to purge the State of treason and disaffection, and save it from existing rebellion and future disorder; therefore, the traitorous and disloyal, when they should get the power, would straightway put all loyalty and patriotism under like disabilities. I might answer this by saying that I suppose they most probably would. In the judicial aspect, I can see also that in times of high party feeling a loyal majority might deprive a loyal minority, or certain obnoxious but innocent persons, of important civil rights and liberties, by enacting against them a legislative sentence of punishment for real or imaginary offences as criminal, but for this very prohibition, which was doubtless inserted into the Federal Constitution for the purpose of preventing such possible injustice; and to this suggestion (I must acknowledge) I have found no reliable answer but in the opinion which holds

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this part of the Constitution to be in substance a bill of pains and penalties, and so far unconstitutional and void.

I am further reconciled to this conclusion by the reflection, that if it seem to admit of any questionable latitude of construction, it is a liberality on the side of the largest liberty—not by any means a licence for disloyalty, but the amplest civil freedom for all submissive and law-abiding citizens,—and establishes a precedent not for the present state of things merely, but for all future times and conditions of the country: wherein it may be said to be the especial duty of the judiciary, which sits as it were upon an eminence, remote from the storm and turmoil of political antagonisms, serenely to maintain a watchful care over those great principles of law and liberty which lie at the foundation of the republic: “*ne quid respublica detrimenti caperet.*”

The judgment will be reversed, and the defendant discharged.

WAGNER, Judge. I concur in reversing this judgment, because I feel bound to yield to the authority of the Cummings case, reported in 4 Wallace; but I dissent from much of the reasoning contained in the above opinion, and I am requested to say that Judge Fagg agrees with me.

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THE STATE OF MISSOURI, Plaintiff in Error, v. ANNA HEIGHLAND, Defendant in Error.

*Constitution—Oath of Loyalty—Attatnder—Teachers.*—The decision in the case of State v. Murphy, ante p. 339, applies to the cases of persons acting as professors and teachers in educational institutions.

*Error to Marion Circuit Court.*

The defendant was indicted for teaching without having taken the “oath of loyalty.”

*Glover & Shepley*, for defendant in error.

This is an indictment for teaching school without taking the constitutional “test oath.” We submit the cause to the

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State v. Tillery.—Moss v. Green.

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judgment of the court on the points and authorities in our brief now before the court in the case of Blair v. Ridgely.

HOLMES, Judge, delivered the opinion of the court.

This case is governed by the opinion in the case of the State v. Murphy. The indictment was quashed on motion, and the plaintiff brings the case up by writ of error.

The judgment is affirmed. The other judges concur.

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THE STATE v. ELIZABETH TILLERY.

*Error to Marion Circuit Court.*

Same.

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JOSEPH T. MOSS, Plaintiff in Error, v. MICHAEL W. GREEN,  
Defendant in Error.

1. *Contract—Evidence—Writing.*—Where a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part only of the contract is reduced to writing, the matter thus left out of the writing may be supplied by parol evidence.
2. *Contract—Consideration—Promise.*—A promise is a sufficient consideration for a promise where there is an absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement.

*Error to Second District Court.*

*Abner Green*, for plaintiff in error.

I. The written contract not purporting to state the particulars, it was perfectly competent to offer parol testimony to explain parts of it on which the writing was silent, such proof not being contradictory to the writing—2 Phil. Ev. 772, Lond. ed; 1 Greenl. Ev. § 284, *a.*; 3 Cow. & H. Notes to Phil. Ev. 1471–2; Rollins v. Claybrook, 22 Mo. 405. No objection was made to the introduction of parol testimony for this purpose.

*Jno. L. Thomas*, for defendant in error.

I. No contract binding upon any one was proven in this case. The paper sued on is not sufficient to bind any one.

II. Parol evidence was inadmissible to explain, add to, or vary the written agreement or memorandum—7 Mo. 515; 1 Mo. 640; 5 Mo. 101.

III. The agreement, if any ever existed, was against public policy, and therefore void.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff against the defendant to recover of him one hundred dollars, alleged to be due on the 1st day of November, 1864. The plaintiff alleges in his petition that he and defendant and one George Moss entered into an agreement at that time, by which they mutually stipulated and agreed that if either of said parties should be drafted as a soldier in the army, the others would each pay him one hundred dollars to aid him in hiring or procuring a substitute; and that a memorandum in writing was drawn up by defendant to show the amount each subscriber thereto would pay. And the plaintiff alleges that soon after the making of said contract he was drafted into the military service of the United States, and had to pay \$700 to procure a substitute. The defendant in his answer denies that a sufficient contract was made, and states that the writing was a mere memorandum preparatory to making a contract. The trial was had before the Circuit Court without a jury, and upon the evidence adduced the court found that there was a contract entered into between the parties as above set out, and found for the plaintiff. The case was then taken to the District Court, where the judgment of the Circuit Court was reversed, and the plaintiff sued out his writ of error to this court.

On what grounds the District Court reversed the judgment of the Circuit Court we have not been able to ascertain. No objections were made to the introduction of the evidence on the trial, establishing the contract and its terms; and if objections had been taken, we are of opinion that the evidence was clearly admissible. For whilst parol evidence is inadmissible to contradict, alter, or vary a written agreement, yet

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where a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part only of the contract was reduced to writing, the matter thus left out of the writing may be supplied by parol evidence—Rollins v. Claybrook, 22 Mo. 405 ; 1 Greenl. Ev. § 284, *a*. The evidence well sustained the judgment of the Circuit Court, and even were it less strong we should not consider that we were justified in disturbing it.

The consideration was ample to support the contract. A promise is a sufficient consideration for a promise where there is an absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement—Pars. on Contr. 448, 5th ed.

Thus in a case where A. conveyed to B. a tract of land containing 221 acres more or less, some years afterwards it was mutually agreed to have the land surveyed, and, if it were found to contain more than 221 acres, the defendant should pay the plaintiff ten dollars per acre for the excess ; if it fell short, the plaintiff was to refund to the defendant at the same rate ;—held mutual promises, and one a good consideration to support the other—How v. O'Mally, 1 Murphy, 287, and note *z*. to 1 Pars. *supra*.

The judgment of the District Court must be reversed, and that of the Circuit Court affirmed.

The other judges concur.

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CATHARINE and HENRY BAKER, Defendants in Error, v. E. S. SCHOENEMAN, Executor of Estate of J. C. RUNKLE, deceased, Plaintiff in Error.

1. *Administration—Appeals—Demands.*—The allowance or refusal of a demand presented against an estate from which an appeal may be taken as provided in ch. 127, § 1, G. S. 1865, p. 514, applies only to the demands specified in ch. 123, § 1, p. 501. An account allowed in favor of the administrator or executor for expenses incurred by him, is not such a demand.

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2. *Administration—Settlements—Appeals.*—The annual settlements of the executor or administrator are not settlements from the allowance of which an appeal can be taken to the Circuit Court. Such settlements are not final nor conclusive as judgments against parties interested in the estate—See *Picot v. Biddle's Adm'r*, 35 Mo. 22.

*Error to the Second District Court.*

*Jos. J. Williams*, for plaintiff in error.

I. The Circuit Court had no jurisdiction of the cause and no power to render judgment against the executor, or to reverse the action of the County Court. An appeal does not lie from the settlements of executors and administrators until final settlements, because the settlements before final settlements are not judgments, and are not binding or conclusive on parties interested in the estate, but may be altered, corrected or annulled at final settlement—*Picot v. Biddle's Adm'r*, 35 Mo. 29. No appeal lies in this case except from a final judgment or decision.

The second clause of the 1st section of the 8th article of the "Act respecting Administration" can only apply to final settlements where there is a final adjudication of all the accounts of the executor, had upon notice to all parties interested in the estate.

II. The decision of the Circuit Court requiring the executor to pay the costs out of his own estate was erroneous; he was entitled to a credit in his settlement for the costs paid by him—*R. C. 1855*, p. 156, § 25. The case of *Woolbridge, Adm'r, v. Draper*, 15 Mo. 470, has no application in this case.

*Jno. L. Thomas*, for defendants in error.

The Circuit Court committed no error in taxing the costs against the executor *de bonis propriis*, nor the District Court in affirming that judgment. The cause of action accrued to Schoeneman as executor and to Runkle in his lifetime, and the case of *Woolbridge, Adm'r of McDonald, v. Draper* is directly in point—15 Mo. 470.

An appeal will lie from a settlement of an administrator or executor—*R. C. 1865*, p. 514, § 1.

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FAGG, Judge, delivered the opinion of the court.

It may be gathered from the record in this case, that the subject matter of controversy between these parties is as to the correctness of an allowance made by the County Court of Jefferson county in favor of the plaintiff in error, and carried into his first annual settlement as a credit. An appeal was taken to the Circuit Court of that county, where the action of the County Court was held to be erroneous and the settlement set aside. The following extract from the records of the Circuit Court will show the facts found as well as its judgment: "And the court proceeding to try the cause anew, doth find that the said executor obtained credit in said County Court for the sum of \$296.45 as costs, attorney's fees and commissions, which accrued in a proceeding instituted by the plaintiff against the executor to recover her absolute property in the estate of said deceased; that said sum was illegally and erroneously allowed to said executor in said settlement; that the same should have been taxed against said executor *de bonis propriis*. It is therefore ordered," &c. The case was taken to the Second District Court, by writ of error, and the judgment of the Circuit Court affirmed. It is now brought here upon a writ of error to the last named court.

It is manifest upon this state of facts that the first inquiry must be directed to the question as to whether an appeal would properly lie from the action of the County Court.

The order of the court which placed the amount in controversy to the credit of the plaintiff in error upon the settlement of his accounts, was not a decision or determination of any matter separate and distinct from the settlement itself. On the contrary, it was just as much a part of it as any other item in the account. The agreed statement of facts upon which the case was decided in the Circuit Court as well as the judgment of that tribunal treats the whole proceeding as an appeal from the settlement. So we shall treat it here, and proceed to inquire whether the law authorizes

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such an appeal. The cases in which appeals shall be allowed from the decisions of the courts having probate jurisdiction are specifically set out in section one, chap. 127, Gen. Stat. 1865. It is only necessary to refer to the two clauses first enumerated: "1st. On all demands against an estate exceeding ten dollars; 2d. On all settlements of executors and administrators." The District Court seems to have proceeded upon the theory that this was a demand against the estate, and therefore embraced in the first class. In our view of the law, this is clearly erroneous. The word "demands," as used in this statute, must be understood as covering no other classes of claims except those enumerated in chap. 123, Gen. Stat. 1865.

It is admitted that the language of the statute is very broad in setting out the second class of cases, but still we think there is no difficulty in coming to a proper conclusion as to its true intent and meaning. An appeal from one tribunal to another is never contemplated in any case except where there has been a final determination of the matter in controversy. This proposition need not be argued; it is too plain to admit of any doubt or cavil. The question is then fairly presented, viz.: Is an annual settlement of an executor or administrator a judgment? In the case of *Picot v. Biddle's Adm'r*, 35 Mo. 29, this question seems to have been very carefully considered. The former decisions of this court touching this point were examined with much care, and the conclusion reached, we think, most clearly followed from the reasoning of the judge who delivered the opinion of the court. We concur fully in the opinion that such settlements have not the force and effect of judgments, and are not conclusive against the persons by whom they are made, nor any other parties interested in the estate.

We apprehend that in all of the cases determined by this court, whenever settlements have been referred to as having the effect of judgments, they were final and not annual settlements. It has been the uniform practice of the courts having probate jurisdiction, and we think correctly so, to

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treat these annual statements of accounts as mere exhibits of the condition of estates, and upon which orders for the payment of debts or distribution might be made according to the circumstances of the case.

With this view of the statute it is apparent that the appeal from the County to the Circuit Court was improperly taken. The propriety of allowing the credit claimed by the executor and carried into his annual settlement may still be reviewed upon a final settlement of his accounts, and we are therefore not called upon to express any opinion upon that point.

The other judges concurring, the judgment of the Circuit Court will be reversed and the cause remanded.

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STATE OF MISSOURI *ex rel.* HENRY C. DAVIS, Respondent, v.  
HARVEY J. MANN, Appellant.

*Constitution—General Assembly—County Courts—Vacating Ordinance.*—By the Constitution, art. 6, sec. 1, the General Assembly was authorized to establish inferior judicial tribunals, and under this power it could reorganize the inferior courts then existing, and to that extent could abrogate the vacating ordinance of 1865. The provision of the statute, G. S. 1865, ch. 137, § 3, declaring vacant the office of justices of the county courts, and providing for the election of new justices, was constitutional.

*Appeal from Sixth District Court.*

*James Carr*, for appellant.

I. The construction given to § 3, ch. 37, G. S. 1865, p. 137, by the Marion Circuit Court, by which the office in controversy was held to be vacant on the 6th of November, 1866, is in direct conflict with the vacating ordinance—§ 2, ch. 2 of said statute; G. S. 1865, p. 60, § 1 of vacating ordinance; id. p. 47; State ex rel. Mississippi & Mo. R.R. Co. v. Macon Co. Ct., present term.

II. The vacating ordinance under which the appellant was appointed to said office is organic in its nature, and as such

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it was not competent for the Legislature to modify, alter or repeal it—38 Mo. 419 ; § 9, art. 1, Const., G. S. p. 42 ; § 28, id. p. 52 ; § 33, p. 682 ; Adj. Sess. Acts of 1863, § 6, p. 689, & § 16, p. 692.

III. The special acts of the Legislature in regard to the election of justices of the County Court of Marion county are not repealed by the General Statutes on the subject—State ex rel. Vastine v. Judge Probate Court, 38 Mo. 529 ; City & Co. of St. Louis v. Alexander, 23 Mo. 483 ; Mauro v. Buffington, 26 Mo. 184 ; § 3 of art. 11 of Const., G. S. 1865, p. 42, & § 6, p. 883 ; Dwar. Stat. 532 ; Sedg. Stat. & Const. Law, 123 ; State ex rel. Mississippi & Mo. R.R. Co. v. Macon Co. Ct., present term.

*Thomas L. Anderson*, for respondent.

I. All the offices of County Court justices in the State were vacated on the 6th day of November, 1866, at the regular election held on the said day by an act of the General Assembly—G. S. § 3, p. 555.

II. It is insisted that this vacating of the office by the Convention in 1865, and the authority conferred on the Governor to fill the vacancies for the remainders of the term, does not conflict with or affect in any manner the act of the Legislature aforesaid vacating said offices—§ 1, G. S. p. 47.

III. The term of holding the office is not fixed by ordinance, nor by the Constitution. The power of fixing, altering or abolishing the term of office belongs exclusively to the General Assembly. The Constitution declares that such county inferior tribunals, to be known as the County Courts, shall be established by the Legislature. The General Assembly, then, has the power to fix their terms of office ; and there being no constitutional restrictions on the Legislature, it may declare the offices vacant whenever it chooses so to do ; or it may abolish the courts and establish other tribunals. It has full and complete control over the subject.

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HOLMES, Judge, delivered the opinion of the court.

The plaintiff was duly elected, commissioned and qualified as one of the justices of the County Court of Marion county in 1866. The defendant had been appointed by the Governor to the same office on the 17th day of April, 1865, under the vacating ordinance of that year, for the remainder of the term of his predecessor, who had been elected in 1864 for the term of six years. The defendant was ousted by the judgment of the court below, and the judgment having been affirmed in the District Court, he brings the case up by appeal.

The question is, which party was entitled to hold the office? By the first section of the sixth article of the Constitution the judicial power is vested in certain courts, "and in such inferior tribunals as the General Assembly may from time to time establish"—Gen. Stat. 1866, p. 35. The County Courts are such inferior tribunals; and there can be no doubt of the power of the Legislature, under this provision of the Constitution, to reorganize those courts. The vacating ordinance of 1865 was so far clearly abrogated by this provision. This conclusion is not necessarily in conflict with the opinion of the judges in relation to circuit attorneys—38 Mo. 419. The General Assembly, in the exercise of this power, in 1866, declared vacant the offices of the justices of the County Courts in each county in the State, upon the day of the next regular election (which was held on the 6th of November, 1866), and provided for a new election of these officers on that day—Gen. Stat. 1866, ch. 137, § 3. At this election in Marion county, the plaintiff was elected. We have no doubt of the validity of this statute; and it follows that the office was vacated on that day.

There being no error in the judgment of the court below, the same will be affirmed. The other judges concur.

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Long et al. v. Towl.

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WILLIAM and JAMES LONG, Plaintiffs in Error, v. GEORGE TOWL, Defendant in Error.

1. *Practice—Appeal—Motion for New Trial or in Arrest.*—Before the party injured by the judgment can take his appeal or writ of error, he must give the inferior court the opportunity of correcting its own error, by filing a motion for a new trial or in arrest, or to set aside the judgment as entered—G. S. 1865, ch. 172, § 6.
2. *Practice—Pleading—Answer—Demurrer.*—A party cannot demur and answer to the same subject matter.

*Error to Second District Court.*

*Perryman & Dining, and Garesché & Mead*, for plaintiffs in error.

I. The amended answer was insufficient because it traverses the same cause of action it confesses and avoids—*Darrett v. Donnelly*, 38 Mo. 492. Because the breaches being specifically assigned, the denials must be specific and *nil debet*, no answer—*Engler v. Bates*, 19 Mo. 545. Motion to strike out, not demurrer, was the proper proceeding—*Phillips v. Evans*, 38 Mo. 309.

II. The petition shows a cause of action, and the answer being no plea in bar, the court could not dismiss the suit; for the court in a demurrer does not look to the exhibits, and defendant claims that a motion to strike out answer is a demurrer—*Curry v. Lackey*, 35 Mo. 392; *Baker v. Berry*, 37 Mo. 306; *Calvert v. Han. & St. Jo. R.R. Co.*, 38 Mo. 465.

*G. I. Van Allen*, for defendant in error.

I. There has been no final judgment rendered in this case. The order of the Circuit Court "dismissing plaintiffs' cause of action" is not a final judgment either in form or fact. That it is not in form, see *Lisle v. Rhea*, 9 Mo. 172; *Jones v. Hopper*, 9 Mo. 173; *Young v. Stonebreaker*, 33 Mo. 117; *Adams v. Trigg*, 35 Mo. 190; *State v. Gregory*, 38 Mo. 501; G. S. 690, § 30. That it is not, in fact, is scarcely a debatable question. Should the plaintiff file a new petition, and

commence a new action on the same contract, a plea of former judgment in bar could not be sustained—*Taylor v. Larkin*, 12 Mo. 103. The final entry of judgment having been made or returned in this case, the writ of error and appeal should be dismissed.

II. There having been no motion made by the plaintiff for leave to amend his petition, for a rehearing, or for a new trial, this court will not consider errors alleged to have been committed in the court below unless an opportunity shall first have been given to the lower court to correct them by motion for new trial—*Woods et al. v. Mosier et al.*, 22 Mo. 335; *State v. Marshall*, 36 Mo. 400; *Banks v. Lades*, 39 Mo. 406.

III. The order of the Circuit Court dismissing the plaintiff's petition on the motion filed by them to strike out defendant's amended answer was clearly right. The plaintiff's objection to defendant's answer was in the nature of a demurrer; and the court, in order to decide the motion, was compelled to look into the insufficiency of the petition, as an issue of law was presented by the answer sought to be stricken out.—1 Tiff. & Smith's Prac. 387-8 & 579; 12 Barb. (S. C.) 573; 5 Sandf. 54; 8 How. Prac. 79.

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs commenced their action in the Washington county Circuit Court against the defendant, and the court dismissed their action; they appealed from that decision to the Second District Court, but filed no motion in the Circuit Court for a new trial or in arrest of judgment. The District Court upon a hearing of the cause affirmed the judgment, and it is now brought here by writ of error. The law provides that, before a case can be taken to an appellate court, a motion for a new trial, or in arrest of judgment, must be filed within four days, if the term so long continue; and if not, then before the end of the term—G. S., ch. 172, § 6. This is intended to give the inferior court an opportunity to correct its own error, and unless such motion is filed at the

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appropriate time, the cause will not be reviewed in the appellate tribunal—*Richmond v. Pogue*, 36 Mo. 313; *State v. Marshall*, 36 Mo. 400; *Banks v. Lades*, 39 Mo. 406. The decision of the Circuit Court must be regarded as an involuntary non-suit entered up against the plaintiffs, and to avail themselves of the error, if error there be in the proceedings, they should have filed their motion to set aside the judgment, and, upon its being overruled, duly taken exceptions. But this they neglected to do, and hence there is nothing available in this court, nor was there anything in the District Court on which to predicate error. The case was not properly in that court, nor is it in this court, and the judgment will be affirmed; but as the matter may be again litigated, we will say that we entirely disapprove of the manner in which the answer was framed, attempting as it did to conjoin the substance of a demurrer with matter which belonged to an answer in the same pleading. Such practice begets confusion, is at variance with the principles of pleading under our code, and ought not to be allowed.

Judgment affirmed. The other judges concur.

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ELIAS C. STEWART and EDWARD C. CUNNINGHAM, Respondents, v. WILLIAM STRINGER, ELIZABETH STRINGER, and JOSEPH W. RUENZI, Appellants.

1. *Practice—Appeals—Record—Amendments.*—After an appeal from the Circuit Court is prayed for and allowed, the record cannot be changed or altered by either party, nor can an entry be filed *nunc pro tunc*; and no addition can be made to the record, the court below ceasing to have any jurisdiction over it.
2. *Practice—Process—Effect of Sheriff's Return.*—Where the return of process served by the sheriff is regular upon its face, it is conclusive upon the parties to the suit, and the remedy of the party injured is by an action for a false return against the officer.
3. *Practice—Process—Constructive Service.*—Where the statute provides for constructive service of process, the terms and conditions prescribed for such service must be strictly complied with. Several defendants cannot be constructively served with a writ by leaving only one copy for all at the usual place of abode. •

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*Appeal from the St. Charles Circuit Court.*

*Wm. A. Alexander*, for appellants.

The judgment in this suit is founded on an error of fact, and may be set aside on motion at any time. There is no limitation in our statute book to proceedings to correct such judgments—*Powell v. Gott*, 13 Mo. 458; *Randall v. Wilson*, 24 Mo. 76.

The sheriff had a right by leave of court to amend his return to suit the facts at any time—*Randalls v. St. Bt. Wm. Pope*, 19 Mo. 157; *Corby, Ass., &c. v. Burns et als.*, 36 Mo. 194; *Webster et al. v. Blunt et al.*, 39 Mo. 500.

The court ought to have admitted the evidence showing that Joseph W. Ruenzi never had any family, and was not a resident of the State at the time of the (pretended) service of the writ, as returned by the sheriff, dated February 12, 1862—*Wendell v. Mugridge*, 19 N. H. 109; *Walton v. Parsons*, 4 McCord, (S. C.) 368; *Watson et al. v. Watson*, 6 Conn. 334; *Owens v. Ranstead*, 22 Ills. 161.

An action on a sheriff's bond for a false return is not always an adequate remedy, and a judgment obtained by a false return will be set aside—*Owens v. Ranstead*, 22 Ills. 161.

In this case there could be no suit on the sheriff's bond, it being more than three years from the date of the return of service of said writ to the time when Joseph W. Ruenzi found out or had any notice of the existence of the suit, or the return thereon by the sheriff—*Limitation Act*, R. C. 1855, § 4, p. 1048. In this case there were three defendants. The return shows service on the defendant Wm. Stringer, but does not show legal service on the other two defendants, Elizabeth Stringer and Joseph W. Ruenzi. As to the two last named defendants, the return is, "did leave a copy of the writ for Elizabeth Stringer and Joseph Ruenzi at their place of abode, with a free white person, a member of the family of the two other within named defendants, a free white person over the age of fifteen years old."

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R. C. 1855, p. 1223, § 7, provides for the service of the summons where there are several defendants. The law requires the officer to leave a copy of the writ for each defendant. Under sec. 8, there could be no constructive service on the defendants unless they had families; that is, where there is no personal service, there can be no service at all on the defendants unless they have families. The copy for the defendant must be left with a member of his or her family. The statute requires the copy to be left at the usual place of abode of the defendant, whereas the return states the copy was left at the place of abode, &c. Where there is a substitute for personal service, the mode prescribed must be strictly followed, and the return must show fully a literal compliance with all the requirements of the law—1 Morris (Io.) 357; 25 Mo. 410.

*Lewis & Bruere*, for respondents.

No case was presented within the statute for a setting aside of the judgment even if the proper course to that end had been adopted. There was no petition for a review, either in form or substance, as required—R. C. 1855, p. 1280, § 13, & p. 1281, § 16.

The plea of infancy being one of personal privilege merely, was waived by the failure to answer, and could not be set up in any shape after judgment.

It was not competent for the defendant to contradict the sheriff's return on the summons, and testimony for that purpose was properly excluded—Diller v. Roberts, 13 Serg. & R. 64; Trigg v. Lewis, 3 Litt. (Ky.) 129; U. S. v. Lotridge et al., 1 McLean, C. C. R. 246; Newhall v. Provost, 6 Cal. 85; Hallowell v. Page, 24 Mo. 493; Bush, Ass. v. Page, 24 Mo. 495; Delinger's Adm'r v. Higgins, 26 Mo. 180; Bank of Mo. v. Bray et al., 37 Mo. 196; 4 Mo. 228; 4 Mo. 315; Ellington v. Moon, 17 Mo. 424.

If the appellant be permitted by this court to show that the sheriff's return was amended after the appeal to this court was perfected, the following authorities will be in point:

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See *v. Bobst*, 9 Mo. 28; *Fairfield v. Payne*, 23 Me. 498, 508; *Thatcher v. Miller*, 13 Mass. 270; *Pilkey v. Gleason*, 1 Clarke, (Io.) 85; *White R. Bk. v. Dooner*, 29 Vt. 332.

Neither the statute (R. C. 1865, p. 70, § 6) nor the settled policy of the law admits of any amendment after judgment otherwise than in affirmance of the judgment and to prevent its subsequent impeachment. Such amendments are never allowed with the object of impairing or destroying the validity of proceedings.

WAGNER, Judge, delivered the opinion of the court.

This appeal is prosecuted from a judgment of the St. Charles Circuit Court overruling a motion to set aside a prior judgment rendered therein. It appears from the record that at the March term, 1862, of the said court the plaintiffs recovered judgment on a promissory note against the defendants William Stringer, Elizabeth Stringer, and Joseph W. Ruenzi. There was no appearance to the action on the part of the defendants, and judgment was taken by default. At the November term, 1865, of the court, upon due notice given to the plaintiffs, Ruenzi presented his motion to set aside the judgment, and assigned for reasons that the judgment was rendered on a note executed before he had arrived at the age of maturity and while he was yet a minor, and that the suit was brought before he was twenty-one years old; that the return on the writ in said cause showed service on him by delivering a copy to a white member of his family at his place of abode, when in fact he had no family, and at the time of the so-called service he was not a resident of St. Charles county, and had no information, knowledge or notice of the said suit or judgment until within a few weeks past, and never answered or appeared in said cause.

Subsequent to the taking of the appeal in this case, the sheriff appeared in the Circuit Court and amended his return, making it conform to the fact set out in the motion, that Ruenzi was not found in St. Charles county, and we are now asked to permit a transcript of this amended return to

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be used and taken as a part of the record in this court. This we cannot do. After an appeal is prayed for and allowed, the record cannot be changed or altered by either party: an entry cannot be filed *nunc pro tunc*, and no addition can be made to it. The court below has ceased to have any jurisdiction over it—Ladd et als. v. Couzins, 35 Mo. 513.

The only question deemed material in the case is as to the sufficiency of the sheriff's return. The courts of some of the States have held that a sheriff's return is merely *prima facie* evidence of the facts therein stated; but the law is firmly settled in this State that a defendant cannot controvert the truth of a sheriff's return. If the return of a sheriff to process is regular on its face, it is conclusive upon the parties to the suit, and the remedy for the party injured is an action against the sheriff for a false return—Hallowell v. Page, 24 Mo. 590; Delinger v. Higgins, 26 Mo. 180.

The return here is as follows: "Executed the within writ and petition on the within named defendant William Stringer, by delivering to him a true copy of the within writ and petition; and also did, on the same day and at the same time, leave a copy of the writ for Elizabeth Stringer and Joseph Ruenzi, at their place of abode, with a free white person, a member of the family; of the two other within named defendants, a free white person over the age of fifteen years old, in St. Charles county, Missouri, on the 13th day of February, 1862.—Charles B. Branham, sheriff."

The revised statute of 1855 (R. C. p. 1223, § 7) provides that service may be made, where there are several defendants, by delivering to the defendant who shall be first summoned a copy of the petition and writ, and to such as shall be subsequently summoned a copy of the writ; or by leaving such copy at the usual place of abode of the defendant with some white person of his family over the age of fifteen years. The service and return were both plainly irregular and defective. The writ purports to have been delivered, according to the return, to one person, a white member of the family of both defendants at one and the same time.

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Now a person cannot be a member of two families at the same time, and it appears that but one writ was left for the two defendants, when the statute contemplates that a separate writ should be left for each of the defendants last served.

When the statute provides for constructive service, the terms and conditions of such service must be complied with. Such being the fact, and there being nothing to show that Ruenzi was ever served with process, and having had no day in court, we think his motion should have been entertained.

The judgment will be reversed, and the cause remanded. Judge Holmes concurs. Judge Fagg absent.

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WILLIAM G. PITTS, Respondent, v. NANCY FUGATE, Adm'x  
of JOHN FUGATE, dec'd, Appellant.

1. *Practice—Verdict—Several causes of Action—Arrest of Judgment.*—Where several causes of action are united in the same petition, a verdict must be found and damages assessed upon each cause of action separately, if the finding be for the plaintiff, or the judgment will be arrested.
2. *Judgment—Security—Evidence—Estoppel.*—Where judgment has been rendered against a principal and his security in a bond, and the security upon satisfying the judgment sues his principal for money paid to his use, the principal is estopped from alleging illegality or want of consideration in the bond.

*Appeal from the Sixth District Court.*

James Carr, for appellant.

W. J. Howell, for respondent.

HOLMES, Judge, delivered the opinion of the court.

In this case there were two counts for separate causes of action joined in the petition, one upon a promissory note, the other for money paid to the use of the defendant. There was no separate assessment of damages or verdict on each cause of action, but one verdict and assessment of damages

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in one gross sum on the whole petition. A motion in arrest of judgment for this reason was made and overruled. It has been decided that a judgment rendered upon such a verdict is erroneous—*Clark v. Han. & St. Jo. R.R. Co.*, 36 Mo. 215; *Mooney v. Kennett*, 19 Mo. 554. The provisions of the present Practice Act on this subject are similar to those of the act of 1849—Acts of 1849, p. 89, § 2; G. S. 1866, ch. 169, §§ 20, 26. The difference between a general and a special verdict is there distinctly defined. A general finding for the defendant on all the issues where there are several causes of action joined in the same petition, may be sustained; but where the finding is for the plaintiff, there must be a separate verdict and a distinct assessment of the damages on each count; otherwise it is impossible for the court to know how the issues were found, or upon which count the damages are assessed. For this reason the judgment must be reversed.

One count alleged the payment of money for the use of the defendant on a judgment rendered against the plaintiff, and the defendant's intestate on a demand in which he was security only for the other. The record of the judgment was not produced in evidence, but the testimony of a witness was admitted without objection to prove the fact of payment, the judgment, and the nature of the transaction. The defendant offered evidence tending to show that the judgment was founded upon a money bond which was void on account of illegality in the consideration. This might have been a good defence to that action, but the judgment was conclusive of that matter. The evidence offered by the defendant here to prove that the consideration of the demand sued on was illegal, was inadmissible in this suit. The bond sued on was merged in the judgment, and was not a proper subject of inquiry. There was no evidence before the jury to sustain the defence on either count.

The judgment is reversed and the cause remanded. Judge Wagner concurs; Judge Fagg absent.

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PHILIP and JOHN SHAW, by their Guardian, Respondents, v.  
CHARLES GREGOIRE, Appellant.

1. *Partition—Tenants in Common—Ejectment—Practice—Action.*—One tenant in common cannot sustain a suit in partition if his co-tenant has disseized him and holds the possession adversely ; the title of the plaintiff must first be established in an action of ejectment.
2. *Partition—Practice—Guardian ad litem—Infants—Process—Judgment.*—Until an infant be brought into court by proper service of process upon himself or his guardian, a court has no authority to appoint a guardian *ad litem* under the Partition Act of 1845—R. C. 1845, p. 765. A judgment of partition entered against infant defendants upon the appearance of a guardian *ad litem* appointed by the court without any service of process, is void.—Hite v. Thompson, 18 Mo. 461, commented upon and explained.

*Appeal from St. François Circuit Court.*

This case was before the court in 35 Mo. 342. After the remanding of the case, the pleadings were amended by both parties. This suit was commenced November 7, 1855. The amended petition recited the proceedings in the suit of Gregoire v. Shaw et als., commenced January 12, 1852, for a partition, &c., and alleged that in said suit no process was served on these, then, defendants, who were minors, living in this State, in Scott county ; that a guardian *ad litem* was appointed by the court at the return term, May, 1852, who entered his appearance but filed no answer ; that judgment of partition was rendered and order of sale made at the return term, and prayed that as against the present plaintiffs the partition might be set aside and a new partition made. At the trial it was agreed that Philip and John Shaw were residents of this State, living in Scott county with their father. The original record of the partition suit of 1852, of Charles Gregoire v. Philip and John Shaw, the unknown heirs of Joseph Butcher and Joseph Buckholtz et als., defendants, was presented in evidence.

The petition in the original case contained two counts. The first count was for partition of 1200 arpens of land, setting out the shares of the different parties, alleging that Philip and John Shaw were minors, and praying that a

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guardian *ad litem* be appointed. The second count was for an account for contribution by defendants for money paid by plaintiff Gregoire in and about the common property, and praying that the defendants be required to pay their share or that the sum paid by Gregoire be deducted from the proceeds of sale if the land should be sold. The record showed that a præcipe was given directing an order of publication in the "Ste. Genevieve Plaindealer," and that an order was issued and published as against all of the defendants but P. and J. Shaw; that W. E. Brady was by the court appointed as guardian *ad litem* for the infants; that he entered an appearance, and that judgment and order of sale was entered at return term. The court found that the appointment of Brady as guardian *ad litem* having been made without service of process upon the infants, gave no jurisdiction to the court, and that the original judgment was void as to the infants.

T. T. Gantt, for appellant.

Upon the record the following points are formally made for a reversal:

I. It was decided in 35 Mo. 342, that the judgment in the partition suit in 1852 was regular, valid, and binding. This was decided on the authority of the case of Hite v. Thompson, 18 Mo. 461, which was governed by a statute in all respects like that of 1845—§§ 53 & 54, p. 774, R. C. 1845.

II. There is not in the present record anything calling for or justifying a different rule of law from that pronounced by the Supreme Court in this cause in 1864. The question of value, that of the making of a motion to set aside the proceedings, and the failure of the minors to take their money from their guardian, are all beside the matter.

III. The record is otherwise full of error as to the plaintiffs. The petition is defective—§ 1, pp. 765-6, R. C. 1845. The finding is defective, for it fails to dispose of a material issue (26 Mo. 471; 1 Co. Litt. 696); and if the proceedings of 1852 were a nullity, there are no proper parties to the present action.

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*Whittelsey with J. B. Robinson, for respondents.*

I. The original suit was commenced in 1852; the practice therefore was controlled by the Acts of 1845, 1847, 1849 (R. C. 1845, p. 765; Practice Act in Chancery, R. C. 1845, p. 835, and Acts of 1847, p. 106), and Practice Act of 1849.

The Acts of 1847, p. 106, allowed suits in partition simply to be commenced by serving a copy and a notice as prescribed in the partition act of 1845, p. 706, or by suit in the ordinary form. The act of February 16, 1847 (Acts 1847, p. 106), left courts of equity their jurisdiction in partition cases.

As the second count in the petition in the case of *Gregoire v. Shaw* was for an account between tenants in common in the same suit with the partition, a matter of which only courts of equity could take cognizance, and as the practice at law and in chancery were combined by the act of 1849, it is evident that the suit was not for a partition at law under the statute, but for a partition and account together in equity. As to the jurisdiction of courts of equity, see notes to *Agar v. Fairfax*, 2 Wh. & Tud. L. C. Eq., P. 1, t. p. 503, Am. ed. 1852; *Spitts v. Wells*, 18 Mo. 468.

II. No process having been served upon the infants, they were not parties to the suit; the court had no jurisdiction to appoint a guardian *ad litem* for them, and the judgment as to them was wholly void—*Hendricks v. McLean*, 18 Mo. 32. The Practice Act of 1849 makes no provision for suits by and against infants; the practice was therefore left as prescribed by the former statutes. A judgment rendered without proper process is void—*Bascom v. Young*, 7 Mo. 1; *Smith v. Ross*, 7 Mo. 463; *Anderson v. Brown*, 9 Mo. 486; *Boonville v. Ormond*, 26 Mo. 193; *Caldwell v. Lockridge*, 9 Mo. 362; *Janney v. Spedden et al.*, 38 Mo. 395; *Smith v. McCutchen, Garn.*, 38 Mo. 415.

III. Until Brady gave bond as guardian, he was not qualified and had no authority to enter appearance—R. C. 1845, p. 774, §§ 53 & 54.

IV. The suit of *Gregoire v. Shaw* being at equity and not

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simply at law, under the Practice Act of 1845 the case of *Hite v. Thompson*, 18 Mo. 461, does not apply to the case as made by the record.

V. The five years allowed for setting aside the judgment had not expired at the commencement of this suit—*R. C.* 1845, p. 831, § 8.

HOLMES, Judge, delivered the opinion of the court.

There is some irregularity in the proceedings, but the merits of the case depend upon the validity of the former judgment in partition as against the plaintiffs.

The petition and amendment may be taken as sufficient to sustain the judgment if otherwise correct. The answer denied the tenancy in common, and alleged that the defendant was holding the premises adversely to the plaintiffs. If this defence had been established, it would have put an end to all right to a partition in this suit, and it would have been necessary for the plaintiffs first to establish their title and right to the possession as tenants in common with the defendant by an action of ejectment. This was decided in the case of *Lambert v. Blumenthal*, 26 Mo. 471. In *Forder v. Davis*, 38 Mo. 107, the same principles were recognized, and it was held that a disseizin, or an adverse possession amounting to an actual ouster of the co-tenants, destroys the unity of possession and takes away the right of partition; but the possession of one tenant in common would presumptively, and without proof of such actual ouster, be the possession of the co-tenants also. The truth of this defence as a matter of fact was involved in the issues which were tried. The court found, in effect, that there had been no such disseizin or actual ouster, nor any such actual adverse possession of the land by the defendant. We do not find that any evidence was offered to prove the fact of such actual adverse possession. The whole matter appears to have been determined as a question of legal seizin by title, and as a matter of law. We must take it that the issue was found against the defendant.

The main question depends upon the validity of the adverse

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title which the defendant endeavored to establish. For the purpose of showing such title in himself to the whole premises, he offered in evidence the record of a former partition suit between Charles Gregoire, plaintiff, and Philip and John Shaw, Joseph Buckholtz, and others, defendants, in the Circuit Court of St. Francois county. It appeared by this record that the suit was commenced by filing a petition for a partition in vacation on the 12th day of January, 1852, returnable to the next May term of the court; that no summons was issued, but that an order of publication was obtained upon an affidavit filed with the petition on the same day, notifying certain named defendants as non-residents, and other parties unknown, of the institution of the suit. Philip and John Shaw, who were alleged in the petition to be minors, and for whom it was prayed therein that a guardian *ad litem* might be appointed, were not named in this order of publication. The record did not show that a copy of the petition, accompanied with notice of the proceeding and of the day in term on which the petition would be presented to the court, had ever been served upon them, or upon any legally appointed or natural guardian, nor that a summons or notice of any kind had ever been served upon them. It appeared from the evidence that they were at that time residing with their father in the adjoining county of Scott. It further appeared by the record that when the proof of publication of the order was made, and a default taken against the parties who had been notified, the court proceeded of its own motion, or upon the prayer of the petition only, to appoint one William E. Brady guardian *ad litem* for these minors, and he accepted and gave bond as such. He filed no plea or answer for them, but submitted their interests to the determination of the court; and thereupon the court ascertained and declared the interests of the parties, and gave judgment that partition be made accordingly. We pass over such defects in the proceedings as might have been matters of error for which the judgment would be reversed on appeal.

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It is evident that the suit was not instituted in conformity with any statute then in force. The order of publication would seem to have been obtained under the seventh section of the Partition Act of 1845. It could not have been done under the Practice Act of 1849 (art. 5, §§ 8 & 11), for the reason that there was no allegation in the petition that unknown parties were interested; nor under the act of 1847 (Laws of 1847, p. 106), for the reason that there was no summons or other proceedings in accordance therewith. This act had provided that suits in partition might be instituted in the manner then prescribed by law for ordinary suits in courts of record. Neither the Practice Act of 1845 nor that of 1849 can govern the case. It was not instituted in conformity with the provisions of either of them. There were, then, two modes of instituting a suit in partition, one under the act of 1847, and the other under the Partition Act of 1845. These two modes of proceeding are explained in *Smith v. Davis*, 27 Mo. 298. It must be taken, therefore, that the intention was to proceed under the law of 1845, if any. But it is plain that the proceedings were not conducted in conformity with the provisions of that act. It contemplated no summons, but the mode of instituting the suit was definitely prescribed by the fifth section of the act, which required that a copy of the petition with notice that the same would be presented to the court on a certain day in term, should be served on all parties interested in the land (who had not joined in the petition), and on the guardians of such as were minors. This method of proceeding had been in practice in this State ever since the statute of 1808—1 Terr. Laws, 204. No such copy of the petition and notice had been served upon these minor defendants, nor upon any guardian of theirs, natural or appointed.

It is now contended that the court had authority to appoint a guardian *ad litem* merely upon the prayer of this petition, without any notice or summons whatever served upon them or their guardian; that such an appointment gave the court jurisdiction over these minor parties; that the

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guardian so appointed had authority to bind them, and that a judgment so rendered is conclusive of their rights and title to this property. For this position the defendant relies upon the 54th section of the statute (R. C. 1845, p. 774), and it is insisted (and argued as if it were *res adjudicata* in this case) that the decision in Shaw v. Gregoire, 35 Mo. 342, recognizing the case of Hite v. Thompson, 18 Mo. 461, as a precedent, has settled the question. This proposition has struck us as so contrary to all principles of law or practice that we are acquainted with, and as so repugnant to all proper notions of justice and right, that we have taken some pains to find where the law could be so written or laid down.

The mode of instituting suit in partition which was provided by the act of 1845 (§ 5) and in previous acts, and which has been continued in nearly the same terms to the present time, evidently contemplated that a copy of the petition with the notice of a day in term on which the petition would be presented to the court should be served four weeks previous to such term on all parties defendant who were interested in the lands, or upon the guardians of such as were minors and had guardians residing in this State; and by the seventh section, upon parties non-resident, there might be notice by order of publication, or by personal service of a copy of the petition and notice. No countenance is anywhere given to the idea that any person, minors or others, could be made a party to such a proceeding without notice or service of any kind, and without any appearance in person or by an authorized representative. It seems to be supposed that the 54th section of the act gave the court power to appoint a guardian *ad litem* for minor defendants whether they or their guardians had been served with notice or not, and particular stress is laid upon the words "*before or after any proceeding by virtue thereof.*" This section plainly refers to any proceeding by the court, and it must be construed and understood with reference to the preceding sections. The 5th section contemplates that the copy of the petition and the notice will be served on all

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parties before the case is presented to the court at all; and this 54th section, while providing that the court shall take no steps against a minor defendant until a guardian has been properly appointed, and making it lawful for the court to appoint a guardian for him, pre-supposes that the minor defendant has been brought before the court according to law for that purpose. But until he is brought into court by a service of the petition and a notice upon him or his guardian, or until he appears in person, or by his lawful guardian on whom such service has been had, or who has authority by law to represent him in such matters without notice, there is not the least warrant, either in the statute, or in common law, or in equity, for any authority in the court to appoint a guardian for him, or to do any judicial act in the premises affecting his rights and estate. At law a guardian for a minor defendant could have been appointed only after the service of process upon him—R. C. 1845, p. 807, § 8; Acts of 1849, p. 77, § 2. It was the same in equity—*Hendricks v. McLean*, 18 Mo. 37; 1 Dan. Ch. Prac. 229; *Day v. Kerr*, 7 Mo. 426; Prac. in Ch. of 1845, p. 1837, art. 1.

That a judgment rendered against a party who has never been brought before the court by any manner of notice, and never appeared or become a party to the record, is utterly void as to him, there is no need of citing authorities.

The decision in *Shaw v. Gregoire*, 35 Mo. 342, was based upon the supposition that the facts of the case were similar to those in *Hite v. Thompson*, and supposed that the court had obtained jurisdiction of the persons of these minor defendants as in that case, where it was held, under the same statutes, that the parties in question there were properly before the court. The precise point here presented does not appear to have been considered in that decision. In the opinion of Dryden, J., overruling the motion for a new hearing, it appears that this record of the former partition was not then before the court, and it was said, "what the record may show we cannot tell."

In *Hite v. Thompson*, 18 Mo. 461, the case was very dif-

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ferent from that which is now presented here. The plaintiff in the partition suit was the legally appointed guardian of the two minors, his wards, who were made defendants as tenants in common with him. Being himself the party plaintiff, he appeared in court in his capacity of guardian, and on his motion the court appointed a guardian *ad litem* for them. The court considered him as having authority as the general guardian to act for them in the matter of the partition under the 58d section of the act, in a case where service of notice upon the guardian of a minor was all that the statute required. He was before the court acting as guardian for them as well as individually for himself; and the point decided was, that he could appear as their representative in his capacity of general guardian, without the service of notice either upon them or upon himself. The language of the opinion must be understood with reference to the question which was under consideration. We cannot take it as any authority for the position that the court would be authorized to appoint a guardian for a minor defendant who had neither been served with notice of any kind, nor was represented before the court by any lawfully appointed guardian whatever.

We must consider ourselves at liberty, therefore, to determine the matter as an open and undecided question. Upon consideration we cannot doubt that the foregoing view gives the proper construction to these statutes. It might even be questionable whether a statute which should expressly authorize a court to proceed against a person who had in no manner become a party to the record, and bind his estate by a judgment rendered in his absence and without his knowledge, and especially that of a minor, without notice to him, and without the knowledge of his adult friends, or his general guardian, natural or appointed, would not be unconstitutional and void as an invasion of the obligation of contracts and vested rights of property. It would be nearly equivalent to taking the property of one person and giving it to another by the mere force of a statute enactment, and scarcely less

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than confiscation. Such a construction will not be given to an act of the Legislature unless it in clear and express terms admit of no other rational explanation. There is no language here that requires such an interpretation. It would do violence to the words, the reason, and the manifest intention of the act, and would be in contravention of the general principles of law. We must hold therefore that this partition, as far as it affected these minor defendants, or their estate in this land, was a nullity.

These conclusions dispose of all the material points. The judgment is substantially correct and will be affirmed. Judge Wagner concurs; Judge Fagg absent.



EDWARD C. GOTT, Plaintiff in Error, v. WILLIAM L. POWELL and JEPHTHA V. BOONE, Defendants in Error.

1. *Practice—Joinder of Actions—Ejectment—Partition.*—A cause of action in ejectment cannot be united with a cause of action for partition of the premises sued for.
2. *Practice—Error—Reversal—Restitution.*—The restitution to which a party is entitled upon the reversal of an erroneous judgment is every thing which is still in the possession of his adversary. If the adversary party has acquired title to land or goods by virtue of his execution, if the judgment be reversed, his title to the land or goods fails, and the land or goods must be restored in specie—not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral right before the reversal.

*Error to Montgomery Circuit Court.*

*Hoy & Buckner*, for plaintiff in error.

*J. B. Henderson & D. R. Dyer*, for defendant in error.

I. There was no error in the judgment of the court upon the facts agreed on. The petition is for partition as a tenant in common with William L. Powell, and for possession of the land against Boone. The action is to obtain partition between himself and William C. Powell, who holds adversely

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to him, and had so held for fifteen years before the commencement of this suit—*Lambert v. Blumenthal*, 26 Mo. 471.

II. If the action be regarded as ejectment and partition, then it cannot be maintained, for such actions cannot be joined—26 Mo. 471.

III. Although these points are regarded as conclusive of plaintiff's case, it is further urged that Gott could acquire no title under the judgment and execution against Powell. So far as he is concerned the judgment was void; but whether void or voidable, he cannot claim to be an innocent purchaser. It was his duty to see that a guardian *ad litem* should have been appointed by the court after the return of the writ, and failing to do so, with full knowledge of the minority of Powell, and afterwards purchasing with knowledge that he was still a minor, so far from being an innocent purchaser, he stands before the court as taking advantage of his own wrong and seeking to divest the infant of his estate. With knowledge of the error in the proceedings; he acquired no title—*Luke v. Marshall*, 5 J. J. Marsh. 353.

IV. The judgment being afterwards set aside by proceedings in which Gott was a party, the execution and sale, at least so far as he is concerned, must fall. All parties to proceedings which result in setting aside a judgment will be precluded from claiming any rights acquired under the judgment; otherwise nothing could be gained by such proceedings, and courts should not entertain them—12 Barb. 84; *McTilton v. Love*, 13 Ills. 486; *Hubbell v. Broadwell's Adm'r*, 8 Ohio, 120; *Dater v. Troy Turnp. & R.R. Co.*, 2 Hill, 629; *Kennedy v. Dunckle*, 1 Gray, 167; 1 Har. J. 405; *Wells v. Stout*, 9 Cal. 498; *Simonds v. Catlin*, 2 Caines, 61; *McLajen v. Brown et al.*, 11 Ills. 523; *Winston v. Ortley*, 25 Miss. 456; *Goodyear v. Ince*, 2 Cro. 246; 2 Binn. 85; 2 Sand. 101-2; 3 Bacon's Abr. 120-1; 2 Phil. Ev. 139, n. 293; 8 Wend. 36; 20 Ills. 276.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff against the de-

fendant Powell and one Boone, for partition and in ejectment of a tract of land. The petition prayed for partition as to Powell and possession as to Boone. A demurrer was filed to the petition, but no decision was rendered on it by the court, and the parties while the demurrer was still pending and undecided proceeded to trial on an agreed statement of facts.

From the facts as agreed upon it appears that the plaintiff in this case sued one James W. Powell, brother of the defendant here, in the Montgomery Circuit Court, in an action of trespass, and at the April term, 1841, obtained a judgment against him for one hundred dollars and his costs of suit. At the time of obtaining the judgment, James W. was an infant not over seventeen years of age. The defendant appeared to the action only by attorney, no general guardian or guardian *ad litem* having been appointed for him, and the question of minority was not brought to the attention of the court. In May, 1841, Gott caused an execution to be issued on his judgment against the defendant, and proceeded to sell all the right, title and interest of the said land in controversy, in October, 1841. At the sale Gott became the purchaser of the land for thirty-three dollars. Gott was acquainted with the defendant, and knew at the time of the commencement of the suit, and at the time of the sale by the sheriff, that he was under 21 years of age. Before the land was sold, and on the same day in the presence and hearing of Gott and others at the sale, it was publicly announced by John, a brother of the defendant, and by others, that the judgment under which the land was about to be sold had been rendered against the defendant while he was an infant and that he was still an infant; that he had not been defended by guardian and that the judgment was void, and that the sale would pass no title. James W. and William L. Powell, who owned the other half of the tract of land, it being 160 acres, together with their mother and her family, remained on the land, claiming the same as their own, until a short time after James arrived at age, when he sold his interest to Thomas J. Powell for four hundred dollars; after which

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Thomas J. and Wm. L. Powell and the family remained on the land claiming it as the land of Thomas J. and Wm. L. In 1847, a motion was made in the Circuit Court of Montgomery county by James W. Powell to set aside the judgment rendered against him in 1841, in favor of the plaintiff Gott, which being overruled in the Circuit Court, was appealed to the Supreme Court, and this court reversed the decision of the court below, holding that when a judgment is rendered against an infant defendant who appears by attorney, he may at any time after he arrives at full age set the same aside upon motion—*Powell v. Gott*, 13 Mo. 458. In 1854, Thomas J. Powell, having divided the land with his co-tenant Wm. L., sold his separate half as divided to Boone, one of the defendants in this cause, who went into possession and has remained in possession thereof from that time to the present. Boone paid eight hundred dollars for the part of the land purchased by him. The court below decided in favor of defendants, and the plaintiff sued out his writ of error.

Had the defendants insisted on their demurrer it is perfectly clear that it should have been sustained, for the petition contained a misjoinder of causes of action and was multifarious. And when one is in possession of land asserting an exclusive title thereto, an action for partition cannot be maintained against him by one out of possession who claims a common title thereto; the claimant must first establish his title in an action in ejectment—*Lambert v. Blumenthal*, 26 Mo. 471. As the defendants proceeded to trial on the facts without pressing their demurrer, they must be regarded as having waived the same.

The only question, then, before us is whether Gott has any title on which he can maintain an action. He does not stand in the position of an innocent third party purchasing under an erroneous judgment, whose rights will be protected, for he was a party to the record and cognizant of all the facts.

n Cow. & Hill's Notes to 2 Phil. on Ev. it is said: "If

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there was original or acquired jurisdiction in the course of the proceeding, though it may be reversible directly," (by which is meant on error, appeal, &c.,) "yet for all other purposes it shall be valid till reversed in respect to everybody. And even after it is reversed, persons not parties or agents in carrying forward the erroneous proceedings, shall be protected by way of defence from prosecution, and often in the titles which they may have acquired"—See *Voorhees v. Bank of U. S.*, 10 Pet. 449.

The restitution to which the party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary. Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie—not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral right before the reversal—*Bac. Abr.*, tit. Error, M. 13; *Darter v. Troy Turnp. & R.R. Co.*, 2 Hill, 629; *Lovett v. The Germ. Ref. Ch.*, 12 Barb. 67; *McTilton v. Love*, 13 Ills. 486; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Clark v. Pinney*, 6 Cow. 297; *Hubbell v. Broadwell*, 8 Ohio, 120; *Green v. Stone*, 1 H. & J. 405; *St. John's College v. Murcott*, 7 T. R. 259.

Upon the reversal of the judgment in the Montgomery Circuit Court, Powell was entitled to full restitution of the land, the equity of no stranger having intervened, and Gott's title entirely ceased.

Judgment affirmed. The other judges concur.

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THEOPHILUS C. PIPER, Appellant, v. THOMAS R. ALDRICH,  
Respondent.

*Practice—Military Service—Judgment.*—By the provisions of the statutes of May 15, 1861 (Sess. Acts 1861, p. 46), and of March 17, 1863 (Sess. Acts 1863, p. 30), a prohibition is placed upon the plaintiff in bringing suit against any person engaged in the military service of this State or of the United States, which precludes him from deriving any benefit from his suit except to prevent the bar of the statute of limitations. If the plaintiff bring his suit, procure constructive service of process, and proceed to take final judgment upon a default, the judgment will, upon proper motion and proof, be set aside at a subsequent term, and the execution issued thereon quashed.—*Bruns et al. v. Crawford et al.*, 34 Mo. 330; *Donnell v. Stephens*, 35 Mo. 441.

*Appeal from Webster Circuit Court.*

*Krum, Decker & Krum*, for appellant.

I. The acts of the General Assembly enacted for the benefit of persons in the military service are personal privileges conferred on a particular class of citizens, of which they may avail themselves, or which they may waive. If the defendant fails to avail himself of this act at the time of pleading, or during the term, according to the Practice Act, he cannot do it afterwards. Any other construction would amount to a repeal of the Practice Act in favor of a particular class of citizens, and ought not to be tolerated.

The Statute of Frauds enacts, "no action shall be brought," &c.; yet defendant must plead and avail himself of it. The Statute of Limitations enacts, "no action shall be brought," &c.; yet likewise defendant waives the act if he fails to set it up in his defence.

The language of the Legislature in regard to granting these extraordinary privileges to the military is the same, and by the well established rules of construction it is to be construed in the same manner. If the defendant had answered and failed to set up this defence, certainly he could not have availed himself of it after judgment. Why? because the act confers a privilege which the party may waive. *A fortiori*,

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where defendant fails to plead at all, the same result must follow.

II. But the act has been already construed by this court in *Donnell v. Stephens*, 35 Mo. 441 (modifying *Bruns v. Crawford*, 34 Mo. 330). If the acts were defences to the action they would be unconditional, but they are allowed as reason for a continuance. It must follow that a defendant who fails to present his claim for a continuance cannot after judgment (in this case two years after) have the judgment set aside.

*Day & Julian*, for appellant.

The court erred in sustaining the defendant's motion to quash the execution and vacate the judgment. It is submitted that the two acts of the Legislature of May 15, 1861, and March 17, 1863 (Sess. Acts 1861, p. 46; Sess. Acts 1863, p. 30), as to contracts on which a right of action accrued prior to the passage of the same, are unconstitutional—11 Wis. 358; 1 Const. 129; 1 Mo. 116; 4 Mo. 50.

Admitting the acts complained of to be valid, the court below erred in vacating the judgment. There was personal service had on the defendant; he failed to appear until a year and a half after judgment was rendered against him, when he appealed and made the motion complained of, which was by the court sustained. In the case of *Donnell v. Stephens*, decided by this court 35 Mo. 441, the court held the acts under consideration did not prohibit commencing an action, and only gave the defendant the right to show that he was in military service and to have the case continued—a right which the defendant in this case waived by failing to appear. The acts in question would be governed by the same rule of law as the Statute of Limitations or Statute of Frauds: a party waives the right by failing to plead them. The effect of the order of the court quashing the execution and vacating the judgment was to dismiss the suit—*Martin v. Martin's Adm'r*, 27 Mo. 227.

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FAGG, Judge, delivered the opinion of the court.

In the examination of this case, we shall confine ourselves exclusively to the points raised by the brief of appellant's counsel, there being no appearance for the respondent.

At the spring term, 1864, of the Webster Circuit Court a suit was instituted by Piper against Aldrich upon a promissory note. Service was obtained by leaving a copy of the petition and writ at the usual place of abode of the defendant with a white member of his family over the age of fifteen years. No appearance was entered for the defendant Aldrich at the return term of the writ, and the plaintiff prosecuted his suit to a final judgment. At the spring term, 1866, the defendant appeared by his attorney and filed a motion alleging that at the time of the commencement of the suit, as well as the rendition of the judgment against him, he was in the actual military service of the State and of the United States. The court was thereupon asked to set aside the judgment, and also to quash an execution that had been issued thereon. The motion was sustained and a judgment rendered in favor of the defendant for costs.

It is insisted that the provisions of the act of 1861, enlarged and extended by the act of 1863, under which this proceeding was had, cannot be so construed as to entitle the respondent to the relief granted by the Circuit Court; that the intention of the Legislature was simply to confer upon persons in actual military service a privilege, which, if not properly pleaded, must after judgment be taken to have been waived. In the case of *Bruns v. Crawford*, 34 Mo. 330, it was held by this court that upon proof made by defendant of his being in military service at the time suit was instituted against him, it was sufficient to authorize the court below to dismiss the cause. A different interpretation, however, was given to this statute in the case of *Donnell v. Stephens*, 35 Mo. 441. The proper meaning and effect of the act was in that case declared to be not to prohibit the bringing of suits against persons thus engaged in military service, but to make that fact

a sufficient ground for a continuance of the cause. Whilst we concur in this construction of the act, we do not believe that the conclusion reached by the appellant's counsel necessarily follows. In the case last cited the defendant appeared in obedience to the writ, and moved the court to dismiss the suit upon the ground that he was in the military service. This motion was sustained by the court below, in conformity with the opinion given by this court in the case of *Bruns v. Crawford*. In reversing the judgment of the Circuit Court, however, there was no intimation given to the effect that if this fact was not pleaded before judgment, it must be taken to have been waived by the defendant. The court very properly held that the Legislature did not intend to permit the courts of the State to sit in judgment upon the rights and property of persons whose time and services belonged exclusively to the government, and who for that reason were unable to devote any attention whatever to their private affairs.

From the very nature of the case this provision of the law cannot be considered as a privilege merely, the benefit or loss of which is made to depend upon the act of the soldier himself. It would be the merest mockery to place a person in military service and take him hundreds of miles away from his home, and tell him to rest secure in reference to any suits that might be commenced against him in his absence, because the Legislature had passed a law permitting him to appear and plead the fact of his service, and that would be sufficient to authorize a continuance of the cause. If, however, for any reason he should fail to appear and set up that fact, he must lose all the protection which the act could give him.

We conclude that there was something substantial in the protection which the law-making power intended to give to this class of persons, and that it was not a mere shadow under which their property might be taken from them, without an opportunity of defending their rights in the premises. In other words, the act intended to place a prohibition upon

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the plaintiff himself, by which he should be precluded from deriving any benefit from the suit except to prevent the statute of limitations from barring his cause of action. If his suit should be commenced after the defendant had entered the military service and before the end of the twelve months after the expiration thereof, the law intended that he should not prosecute it any further.

In this case, however, the plaintiff, in violation of the true spirit and intent of the act, had obtained a judgment, and there is no way by which that intent could be effectuated except by setting the judgment aside.

Under this view of the law, it is wholly immaterial whether the respondent had a good defence to the action or not. The plaintiff had obtained something to which he was really not entitled, and it makes no difference that it was secured under the forms of law. Having proceeded in violation of the express prohibition of the statute, he should not be permitted to reap the benefits of his own wrong. No other remedy could have been given to the defendant, and the court committed no error in sustaining the motion.

The judgment will be affirmed. The other judges concur.

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JAMES C. POWERS, Defendant in Error, v. CASPAR H. KUECKHOFF, Plaintiff in Error.

1. *Practice—Pleading—Replication.*—By the Practice Act of 1855, no replication to an answer was required to be filed unless the answer pleaded a set-off or counter-claim—R. C. 1855, p. 1233.
2. *Mortgage—Deeds of Trust—Trustees' Sales.*—Sales by trustees under the powers contained in deeds of trust executed to secure an indebtedness must be made with precision. The notice given by the trustee should contain such facts as reasonably to apprise the public of the place, time and terms of sale, and of the property to be sold; but mere omissions and inaccuracies in these respects not calculated to mislead, and working no prejudice, will not be regarded. A notice stating that the property would be sold for cash, at the court-house door in the town of Hillsboro, but omitting to name the county and that the property would be sold to the highest bidder at public vendue—held, sufficient.

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3. *Conveyances—Trustee's Sale—Purchaser—Notice.*—A purchaser at a trustee's sale will not be affected by any previous agreements made between the creditor and debtor, unless he had notice of such agreement before his purchase.

*Error to Second District Court.*

This was an action brought by defendant in error to recover a tract of land in Jefferson county containing about 134 acres, and damages for timber alleged to have been cut thereon by plaintiff in error. The defendant answered denying that he unlawfully withheld from plaintiff any part of said land, and denying that he was entitled to judgment for any timber cut thereon by defendant; and alleging that the defendant is the legal owner of the following part of the lands described in plaintiff's petition: sixty acres, being the west part of the north-east fractional quarter of section fifteen, and the south fractional half of the south-east fractional quarter of section ten, in township forty one of range five east; that the defendant acquired title to the same from Richard J. Maupin by deed of the 2d day of March, 1857, and has had possession of the same ever since, and denied being in possession of the residue of said lands described in the petition. Defendant further states that plaintiff claims said  $134\frac{1}{100}$  acres of land as a purchaser at a trustee's sale made on the 4th of April, 1864, under a deed of trust given by Richard J. Maupin on the 9th of October, 1856, to secure the payment of a note of about eighty dollars to Josiah Craft. The answer set up as a defence, that the sale was not made in accordance with the terms of the deed of trust. The answer further alleged that at the time defendant received his deed for said sixty acres it was expressly agreed by and between Josiah Craft and defendant, that said Richard J. Maupin should pay said Craft \$35 on the note secured by the deed of trust, and that thereupon said Josiah Craft should release the deed of trust upon the said sixty acres of said land bought by said Kueckhoff; and that the \$35 was paid to said Craft at the time by said Maupin before he executed his deed to said Kueckhoff for said sixty acres, and that Craft

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thereupon agreed and promised said Maupin and Kueckhoff that he would credit the note with said \$35 and release the deed of trust on the sixty acres bought by defendant.

The evidence of plaintiff tended to prove that Maupin held a patent for the land; that he, on the 9th day of October, 1856, gave a deed to E. T. Honey as trustee, on said land, to secure the payment of a note for \$68 to Josiah Craft; that said Craft's administrator afterwards, to-wit, on the — of —, sold the land by said trustee and that the plaintiff bought the same. He offered the notice of sale and trustee's deed in evidence, which were objected to by defendant on the ground that such sale was illegal and void; that no notice of the sale was given; that the notice attached to the deed was insufficient, as it did not definitely state the place of sale, in what county, nor that the land would be sold at public vendue and to the highest bidder. The court overruled the objection and permitted the notice and deed to be read, to which the defendant excepted. That defendant had cut some timber on the land; that the sixty acres bought by the defendant, and the residue seventy-four acres, were each worth at the time of the trustee's sale one hundred dollars. The note of \$68 given by Maupin to Craft, having a credit on it of \$35, dated the 2d of March, 1856, and afterwards erased, was read in evidence. The administrator of Craft stated he did not know who erased it; he found it so on becoming administrator.

The defendant then read a deed of said Maupin conveying said sixty acres to the defendant, executed in March, 1857, being part of the land in controversy.

Defendant offered evidence tending to prove the agreement between Craft, Maupin and defendant, and that plaintiff had knowledge of the agreement at the date of his purchase.

*Abner Green*, for plaintiff in error.

I. The Circuit Court committed error in admitting the notice of the trustee's sale and deed from the trustee to be read in evidence, as the notice attached to the deed showed

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on its face that the trustee had not pursued the power given. A trustee is an agent of both parties, and acts from delegated powers; it is therefore essential that he should strictly pursue the powers given—*Stine v. Wilkson*, 10 Mo. 75; *Thornburg v. Jones*, 30 Mo. 514; *Conway v. Nolte*, 11 Mo. 74.

The rule that the recitals in the deed are presumptive evidence that he has complied with the requisites of the law in the sale will not apply to trustees' sales; they are not officers of a court—*McCormack v. Fitzmorris*, 39 Mo. 24.

II. The Circuit Court erred in not sustaining defendant's motion for judgment on the new matter constituting a counter-claim as alleged in defendant's answer, there being no replication denying the same—*R. C. 1865*, §§ 12, 13 & 16, p. 659.

*J. L. Thomas*, for defendant in error.

I. This suit was commenced under the code of 1855. No replication to the new matter set up in the answer was necessary, the new matter not constituting a counter-claim—*R. C. 1855*, p. 1233, §§ 15, 16 & 17; 37 Mo. 443.

II. The recitals in the deed of the trustee to Powers are *prima facie* evidence that the terms of the deed of trust were complied with—39 Mo. 443; *id.* 24.

III. The notice of the time, terms and place of sale were definite enough. The deed of trust did not require that notice should contain certain things, but merely provided that it should specify the terms, time and place of sale. The deed then went on to appoint the mode and manner of the sale. The case in 21 Mo. 313, is conclusive upon this point. The notice here recited the date and page of record of the deed of trust, and then stated the land described in the deed of trust would be sold at Hillsboro for cash in pursuance of the terms of the deed. The land lay in Jefferson county; Hillsboro, a small town, was in Jefferson county; the deed of trust was recorded in Jefferson, and when the notice informed the public that this land would be sold at the court-

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house door in the town of Hillsboro, it appears this ought to be sufficient to inform every one of "the place of sale."

IV. As to the release of the sixty acres in controversy by Craft the evidence is too vague to affect Powers, who never had any notice of such release until after the sale under the deed of trust.

WAGNER, Judge, delivered the opinion of the court.

The objection urged by the plaintiff in error, that judgment should have been rendered in his favor because there was no replication to his answer in the court, cannot be sustained. The proceeding was commenced under the practice act of 1855, and must be conducted in accordance with its provisions, and as the answer contained no counter-claim or set-off, no replication was necessary under that act.

The next point, and the principal one in this case, is as to whether the notice of sale given by the trustee was sufficient, or whether the title of the defendant in error is affected by means of any informality in it. The deed of trust empowers the trustee to sell the premises, or any part thereof, "at public vendue, to the highest bidder, at the court-house door in the town of Hillsboro, in said county (Jefferson), for cash, first giving twenty days' public notice of the time, terms and place of said sale, and of the property to be sold, by six advertisements put up in six public places in different parts of the county." The notices put up by the trustee contained the following: "Now at the request of the legal holder of said note, I will, on Monday, the 4th day of April, 1864, at the court-house door in the town of Hillsboro, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, sell said real estate for cash in hand for the purpose of paying said note." It is now insisted that because the notices did not strictly and literally pursue the directions in the deed in designating Hillsboro as in Jefferson county, and stating that the property would be sold at "public vendue" to the "highest bidder," the sale was void and no title passed under it to the grantee.

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The greatest impartiality and good faith are required of trustees, and, as they are invested with the extraordinary power of transferring one man's property to another, they must pursue their authority with precision to render their acts valid. The notice given by them should contain such facts as reasonably to apprise the public of the place, time and terms of sale, and the property to be sold. But mere omissions and inaccuracies in these respects, not calculated to mislead and working no prejudice, will not be regarded—Gray v. Shaw, 14 Mo. 341; Beattie v. Butler, 21 Mo. 313. We do not think that any injury could have resulted because the trustee in his notice omitted to describe Hillsboro as in Jefferson county. He had just stated that the land was situated in Jefferson county and that the sale would take place at the court-house door in the town of Hillsboro: it was well known to every body who read the notice that that town was the county seat, and that the court-house was there. The notice imparted the requisite information as to place. As to the failure to state that the sale would be at public vendue and to the highest bidder, we think that of itself is not sufficient to justify us in declaring the proceeding void. The notice stating that the property would be sold for cash at the court-house door would lead to the presumption that it was to be set up at public auction to the highest bidder. And although no legal intendment is made in favor of a sale by a trustee as in case of sheriff's sales on execution, yet we are inclined to consider the acts of the trustee in this case sufficient until it be shown that injury resulted as a consequence. It has been held that notice of sale at "city hall" or "merchants' exchange" is good, as by usage such sales take place at the rotunda of those buildings; but to be good they must take place at the rotunda—Hornby v. Conner, 12 How. Prac. 490. Public policy as well as the stability of rules of property demand that sales and titles founded thereon should not be avoided, for slight and trivial reasons; but where the power has not been executed in accordance with essential conditions, the sale and deed will be held to be utterly void,

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both at law and in equity—*Stine v. Wilkson*, 10 Mo. 75; *Thornburg v. Jones*, 36 Mo. 514; *Jackson v. Clark*, 7 Johns. 217; *Miller v. Hull*, 4 Denio, 104; *King v. Buntz*, 11 Barb. 192; *Sherwood v. Reed*, 7 Hill, 431; *Dana v. Farrington*, 4 Minn. 433.

The evidence is clearly insufficient to show that Powers was ever impressed with notice of the arrangement entered into between Craft and Maupin for the release of the deed of trust on the sixty acres of land till after he purchased at the trustee's sale, and as the question was submitted to the court its finding will not be interfered with.

Judgment affirmed. The other judges concur.



JOSEPH MOREAU *et al.*, Respondents, *v.* JUSTINE DETCHEMEN-  
DY *et als.*, Appellants.\*

1. *Practice—Partition—Ejectment.*—An ejectment and partition cannot be united in the same count.
2. *Constitution—Bills of Credit—Mortgage.*—A mortgage given to secure a debt, the consideration of which was Loan-Office certificates, is void.—See *Craig v. State of Missouri*, 4 Pet. (U. S.) 410.
3. *Lands and Land Titles—Ejectment—Outstanding Title—Mortgage.*—A mortgage more than twenty years old cannot be set up as an outstanding title to defeat an action of ejectment, without proof of possession under the mortgage or of the present existence of the mortgage debt.—S. C. 18 Mo. 522, P. 2.
4. *Lands and Land Titles—Ejectment—Conveyance—Tax Deed.*—The mere production of a deed from the Auditor of the State for land sold for taxes, in 1834, is insufficient to establish a title under the statutes relating to the sale of lands for taxes.
5. *Conveyances—Sheriff's Deed—Seal.*—An instrument, purporting to be a deed executed by a sheriff conveying land sold under a judgment, to which no seal is attached nor scrawl affixed, is inoperative as a conveyance.—See *Moreau et al. v. Branham et als.*, 27 Mo. 351.

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\* See *Moreau v. Detchemendy*, 18 Mo. 522, and *Moreau v. Branham*, 27 Mo. 351.

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*Appeal from Ste. Genevieve Circuit Court.*

*J. A. Beal*, for appellants.

I. The defendants being in adverse possession, partition will not lie.

II. The court erred in admitting the power of attorney after the trial had closed, because it was out of order of evidence, and because it was not proven that it was acted under and is not connected with any part of the case.

III. The mortgage deeds from P. Detchemendy to the State and to Chouteau and others, show an outstanding title sufficient to defeat plaintiffs' action. In order to furnish the presumption of payment of mortgage after twenty years there must be an adverse possession by the mortgagor, and limitations will not run where neither the mortgagor nor mortgagee had possession—27 Mo. 198; 20 Mo. 98; 20 Mo. 428. In this case Pascal left the place and held no possession after his mortgages. Neither the mortgagor nor mortgagee had possession of the lands after the execution, so there is no limitation, and the title of these parties is outstanding and effectual, and can be enforced in law.

Where possession has been had for a long time under claim of title, it is not necessary to produce the deed—18 John. 40; *Smith v. Lorillard*, 10 John. 356.

It is not necessary to show a regular chain of conveyance from the first purchaser in adverse possession—*Craddock v. Stalcross*, 1 Tenn. 351; *Gallatin v. Cunningham*, 8 Cow. 382.

Possession of a part is a possession of all the land covered by the deed or party's title—1 Nott & McCord, 396; *id.* 357. Seizin is not bounded by actual possession, but is co-extensive with the title—5 Har. & Johns. 245.

IV. As an ancient deed over thirty years old, the sheriff's deed was sufficient, and the law presumes it to be rightly executed—1 Greenl. Ev. § 144.

After thirty years' possession the law presumes all things to be done in due form—*Schauber v. Jackson*, 2 Wend. 13;

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3 John. 292; 2 Day, 280; 7 East, 279; 9 Ves. 5; 5 T. R. 259; 2 T. R. 583; 3 Stark. Ev. 936 & 904; 14 Mass. 145, 177; 10 Mass. 105; 17 Mass. 72; 2 N. H. 310.

By these decisions the sheriff's deed to St. Gemme is presumed after thirty years to be good, properly executed, and in form.

*Jno. L. Detchemendy*, for respondents.

I. The mortgage from Pascal Detchemendy to the State in consideration of a "Loan Office" certificate was void from the beginning—*Craig et al. v. State of Mo.*, 4 Pet. 436.

II. Even if the mortgage to the State for a "Loan Office" certificate had been a legal act, and the mortgage to Pierre Chouteau and others embraced survey No. 2060, it could not avail the defendants, because these mortgages were of more than twenty years' standing—*Moreau et al. v. Detchemendy et al.*, 18 Mo. 529.

III. The instrument from the sheriff from Ste. Genevieve county to St. Gemme in 1823 was wholly inoperative, as said instrument was found not to have been sealed by the sheriff—27 Mo. 351; 18 Mo. 530 & 531.

IV. The plaintiffs were not barred of their right to recover by virtue of the statute of limitations, as no one was in possession of survey No. 2060 prior to sometime between the years 1835 and 1839—*Paddleford v. Dunn*, 14 Mo. 522.

V. The deed from the State Auditor cannot be taken as *prima facie* evidence of title—*Mortin v. Reeds*, 6 Mo. 73; *Reeds v. Morton*, 9 Mo. 878.

HOLMES, Judge, delivered the opinion of the court.

The case is to be regarded upon this record as an action of ejectment. The plaintiffs claim an undivided interest of seven-ninths in the land in controversy, as tenants in common with the defendants, who are holding the possession of the whole premises adversely to the plaintiffs and deny the co-tenancy. The petition seems to have been drawn upon the erroneous conception that an ejectment and a partition

could properly be united in the same count. The answer took issue upon it as an ejectment. Rejecting what is stated in reference to a partition as surplusage, it might still admit of some question whether enough remained to constitute a good petition in ejectment under the statute relating to that action ; but as there was no demurrer, and no point is raised on this ground, we are inclined to hold it sufficient on appeal. It was tried below as an ejectment, and will be so considered here. The suit was commenced in 1852, and there was a finding of the facts by the court sitting as a jury under the Practice Act then in force. Upon a careful examination of the evidence, we are satisfied that the finding of the court as to the facts was well warranted ; nor do we find any error in the instructions that would justify a reversal of the judgment.

The land in controversy (being U. S. survey No. 2060, in the county of St. Genevieve) was conveyed by patent from the United States to Pascal Detchemendy in 1834. He died in 1844. The plaintiffs claim by descent as heirs. It is clear that the title descended to them unless it had been conveyed away by their ancestor before his decease. The defendants endeavored to show that the title of P. Detchemendy had been conveyed to them by valid conveyances, or that, if the deeds were ineffectual to pass the title, they had held an adverse possession under them for a sufficient length of time to bar the plaintiffs' action under the statute of limitations. The evidence wholly failed to establish such an adverse possession. The possession of this land by defendants and those under whom they claimed as against the plaintiffs and the common ancestor, so far as it was ever adverse, began within the period of the statute bar then in force. The defendants undertook to prove a legal seizin in themselves, or those under whom they claimed adversely, by virtue of title anterior to any actual adverse possession of this land by them: they also attempted to show an outstanding title in other persons. For the latter purpose, they gave in evidence two mortgages from Pascal Detchemendy, one to the State of Missouri, and the other to Pierre Chouteau and others. The

mortgage to the State was executed in October, 1821, to secure the payment of a loan of one thousand dollars and interest; and it appears, that, after the evidence was closed, some dispute arising whether this loan was made under the act concerning loan-office certificates, the court allowed the plaintiffs to introduce a power of attorney of the same date as the mortgage from P. Detchemendy, authorizing his agent to make a loan of such certificates from the State. That a mortgage to secure such a loan was utterly void was determined in the case of *Craig v. The State of Mo.*, 4 Pet. 410, in which it was also held that any competent evidence bearing upon the consideration was admissible. The court would take notice of the laws of the State. Even if the evidence here, without this power, were to be considered insufficient to show the nature of the loan, the admission of the document under the circumstances did not go so far beyond the proper discretion of the court that we could disturb the verdict on that ground alone. Still further, if it had appeared that the mortgage had been made upon a valid consideration, it would have fallen within the decision in *Moreau v. Detchemendy*, 18 Mo. 530, in regard to this same mortgage to Chouteau and others, which is again relied upon in this case for the same purpose; and both mortgages must be disposed of in the same way. It was said, in that case, that when both parties are claiming under Pascal Detchemendy, and neither of them under the mortgagees, and the mere instrument of mortgage, more than thirty years after its date, is set up to defeat the plaintiff's action, without any proof of possession under the mortgagees or of the present existence of the debts, the mortgage is entitled to no consideration as a bar.

To show a seizin by title, and to support a claim of adverse possession, the defendants relied, first, upon a tax deed from the Auditor of the State, dated July 18, 1834, with nothing more to establish a tax title under the laws then in force. The cases of *Morton v. Reeds*, 6 Mo. 64, and *Reeds v. Morton* 9 Mo. 868, which arose under the same statutes, are clearly to the effect that this deed alone was wholly insufficient to

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prove a title of that nature ; and there was no adverse possession under this deed until within the twenty years ; and, secondly, they claimed title under an execution sale upon a judgment against P. Detchemendy in 1823, and a sheriff's deed to one St. Gemme, which was expressed in the body to be executed under the "hand and seal" of the sheriff, but no seal, or scrawl by way of a seal, was affixed. It was held in *Moreau v. Detchemendy*, 18 Mo. 530, that this instrument was no deed ; but it was said that if the court below had found it to have been a deed upon evidence authorizing presumptions to be made, this court would have considered whether such evidence justified such a presumption. In *Moreau v. Branham*, 27 Mo. 353, it was held that the court was still further precluded from considering any such presumption by the admission in the answer that it had never been a sealed instrument. In this case, the answer contains no such admission. On the other hand, there is no proof of any special facts or circumstances extraneous to the instrument that can furnish any proper basis for a natural presumption of fact upon which a jury might infer that it had once been sealed, if morally convinced that such had been the fact. The matter rests upon the face of the paper only. It is insisted that the court might presume it to have been a sealed instrument as being an ancient document (more than thirty years old) found in the proper custody. The case was submitted under this instruction : that "if the court finds from the evidence that the sheriff's deed from Francis Vallé, sheriff, to St. Gemme, was a sealed instrument, then it is legally sufficient to divest the title of Pascal Detchemendy in the land which said deed purports to convey." The court has found that it was not a sealed instrument. The evidence was not such that we can say the finding was against evidence, or that the facts proved were sufficient to raise even a disputable presumption of law. Scrawls have been in lawful use, by way of seals, in this State, ever since the act of July 3, 1807 (*Laws of Louis. Ter.* 106 ; *Geyer's Dig.* 250 ; *R. C.* 1825, p. 215) ; though seals by wax or wafer were not wholly super-

seded. There is nothing to indicate that this instrument had ever been sealed by an impression on wax or wafer which might have been detached by the wear and tear of time. It is probable that the custom of using a scrawl by way of seal was nearly as universal in 1823 as it is now. The probability is rather that a scrawl was omitted; and there is scarcely a possibility that a scrawl could have been lost off. The policy of maintaining the distinction between sealed instruments and those not under seal is vindicated by learned authorities—Warren v. Lynch, 5 J. R. 245; 4 Kent's Com. 452; 4 Crui. Dig. by Greenl. 27, n. 2; Bradford v. Randall, 5 Pick. 496. And it is settled in this State that two things are equally necessary under the statute to constitute a good sealing by the use of a scrawl: first, that it should be so expressed on the face of the instrument; and second, that a scrawl by way of seal should be affixed—Grimsley v. Riley, 5 Mo. 280; Walker v. Kiler, 8 Mo. 301.

Where a parchment exemplification of a commission, issued by the Crown in the reign of Queen Elizabeth, to inquire into the boundaries of a town, was produced from the corporation chest, in 1838, showing a slip of parchment at the foot corresponding in size and form with that on which the great seal was usually affixed, though there was nothing else to show that the seal had ever been affixed, the court presumed that the seal had been accidentally removed—Beverly v. Craven, 2 Mood. & Rob. 140. This deed can hardly be considered an ancient document of that sort, and the circumstances are very dissimilar. It was made in the execution of a statute power which must be strictly pursued, and upon a sale of property *in invitum* as to the owner. It is not really a case where the actual possession of land has been held for a long time under the deed only. The title was claimed here under other deeds also; and the actual possession, if there were any adverse, did not reach back for twenty years. We find no authority that would authorize such a presumption to be made in a case like this, and must hold the ruling of

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the court below to be correct. Nor was the case submitted under instructions which contemplated that the court might advise the jury to presume a conveyance of title upon special facts and circumstances proved, together with long continued possession though short of the period of the statute bar, which might possibly in certain cases authorize a legal presumption that the title had been conveyed by some valid deed, within the principle recognized in *Dessaunier v. Murphy*, 22 Mo. 104.

It was contended by the defendants that these deeds, though ineffectual to pass the title, were sufficient to support a claim of possession, and extend the actual possession of a part claiming the whole to the entire tract so as to amount to a disseizin of the true owner not in the actual possession of any part. The evidence was not sufficient to sustain this pretension. There was no actual possession on the particular land in controversy, under any deeds whatever until within the twenty years. The first possession by Clement C. Detchemendy appears to have been confined to the larer tract on which the dwelling-house was situated and to the other small tract on which there was a mill; and it would seem that he claimed merely as a tenant in common with his father. When his possession became so far adverse as to amount to a disseizin and actual ouster of the co-tenant is quite uncertain, if it ever became such. This subject was discussed in *Warfield v. Lindell*, 38 Mo. 561. But it is very clear that he never took any actual adverse possession of this survey No. 2060 until between 1837 and 1839. Nor can the earlier possession on the other tract be extended to this tract. Moreover, he appears to have bought in the tax title and the title or claim under the sheriff's deed, while he was a tenant in common, and there is nothing in the evidence to make it very decisive or satisfactory that he should not be deemed to have purchased those claims for the benefit of the other tenant in common as well as for his own. At any rate, we are satisfied that the defence under the statute of limitations was not made out. There was no error in refusing the instructions on this point.

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The judgment was, that "the plaintiffs were entitled to recover an undivided interest of seven ninths of the property and \$933.33 damages and costs." The record exhibits some informalities and irregularities, but there is no substantial error.

The judgment will therefore be affirmed. The other judges concur.

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JOSEPH L. PAPIN, Respondent, v. AUGUSTUS A. BLUMENTHAL  
*et al.*, Appellants.

*Supreme Court—Practice—Partition—Final Judgment.*—No appeal lies from the judgment "that partition be made" until the final confirmation of the report of the commissioners. An entry made by the judge upon the copy of the order attached to the report of commissioners "approved," &c., is not a judgment of the court. A judgment of confirmation of the report should be entered upon the record. The entry of an order refusing to sustain a motion to set aside the report, is not a final judgment in the cause. A judgment of partition and order of sale may be set aside at a term subsequent to that of the entry of the judgment, all the parties consenting,

*Appeal from Franklin County Circuit Court.*

Jno. N. Straat, Knox & Smith, and Geo. P. Strong, for appellants.

Glover & Shepley, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was a suit in partition. In 1856, there was a judgment of partition which ascertained the rights and interests of the parties and ordered a sale of the property by the sheriff. This judgment was affirmed on appeal, in *Papin v. Massey*, 27 Mo. 445; 24 How. (U. S.) 362. The decision was final and conclusive so far. Nothing remained to be done but to carry the judgment into execution by further proceedings in accordance therewith. Properly there would have

been a sale by the sheriff, under the statute, according to the order made. Nothing of the kind was done.

But it appears by the record that, in 1864, all the parties, both plaintiff and defendants, Blumenthal and Whitmore appearing in their own proper persons, consented and agreed that the previous order of sale should be set aside, and that the court should make a new order appointing commissioners to make partition of the land in kind. We suppose this might be done by the consent and agreement of all the parties. The order was made accordingly.

A report was made by these commissioners, and on the 29th of September, 1864, an endorsement was made upon a copy of the order attached to the report in these words, "Approved: J. W. Owens, Judge," and the document was filed. We do not find by the record that any final judgment of confirmation has ever been entered, upon the coming in of this report, that such partition "be firm and effectual forever," in accordance with the statute—R. C. 1855, p. 1115, § 26. The mere approval by the judge is certainly no such judgment. Nor does there appear to be any final judgment in these proceedings from which an appeal would lie to this court. The refusal of the court below to sustain the appellants' motion to set aside the report was not a final judgment. Before a final judgment could properly be rendered, upon the filing of the report, there should have been time given and an opportunity allowed to the parties to file exceptions to the report. These exceptions being disposed of, there should have been a final judgment of confirmation before the case came here—*McMurtry v. Glascock*, 20 Mo. 432.

There appears to be a dispute about the authority of a certain attorney to act for some of the parties. It is scarcely possible for us to understand the merits of this controversy.

We see no better way than to dismiss this appeal and leave the parties to further proceedings in the court below upon this report as made. If any of them are dissatisfied with the report, let them file their exceptions, and have them passed upon by the court. If the report be found to be just and

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proper, a final judgment of confirmation can be entered ; or if otherwise, it can be set aside and new commissioners appointed—R. C. 1855, p. 1114, § 25.

If there were any fraud or mistake as to the agreement to a modification of the former order, we suppose there may be a proper way of reaching that matter.

The appeal will be dismissed at the cost of the appellants, with leave to any of the parties to except to the report or move to have it set aside.

Judge Wagner concurs ; Judge Fagg absent.

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JAMES HART, Respondent, v. CHARLES E. HESS, Public Administrator of St. Charles County, having in charge MARY HART'S ESTATE, appellant.

*Contract—Promise—Parent and Child.*—Where a child after coming of age resides with a parent and renders services, it will be a question for the jury to decide, taking into consideration the nature and degree of the relationship, the circumstances in life of the parties and other matters which may affect it, whether there was an implied contract for compensation. The statements of the parent are admissible in evidence for the plaintiff in connection with other circumstances.

*Appeal from the Sixth District Court.*

*Kingsberry & Hess*, for appellant.

I. The Circuit Court erred in admitting the declarations of Mrs. Hart. They were not declarations against her interest so that they would have been admissible in favor of claimant in a suit against her while living ; they are not evidence of any contract to pay plaintiff for services—are not admissions of indebtedness—are mere expressions of a consciousness of moral obligation—of gratitude. They did not tend to show that mother and son had an understanding or contract that services were to be rendered for wages, or wages paid for services—*Dyer v. Ainsworth*, 9 Barb. 619. Such declarations were illegal evidence tending directly to mislead the

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jury—2 Grah. & Wat., New Tri. 644-5; Weeks v. Lowerre, 8 Barb. 630.

II. The court should have granted the instruction asked by defendant—Add. on Cont. 428-9; Ridgway v. English, 2 Zabris. (N. J.) 409; Oxford v. McFarland, 3 Ind. 156; Sprague's Adm'r v. Waldo's Adm'r, 38 Vt. 139; Condor's App., 5 Watts & Serg. 513.

III. The instruction granted by the court was erroneous because it does not lay down the general principle of law in reference to contracts of hiring correctly. "The law is," says the instruction, "that where services are rendered and received a contract of hiring or an obligation to pay will be presumed." This is not correct in not limiting its application to strangers—Add. on Cont. 428; 1 Pars. on Cont. 529. And it is not cured by what follows: "But a presumption may arise from the relationship of the parties that the services rendered are acts of gratuitous kindness." As applied to this case, relationship of parent and child, a presumption does arise that the services are gratuitous. The instruction is not explicit (3 Grah. & Wat., New Tri. 773, et seq.) and does not state the law correctly—Lovell v. Brice, —Wright, 89; Andrews v. Foster, 17 Vt. 556; Resor v. Johnson, 1 Cart. (Ind.) 100; Zerbe v. Miller, 16 Penn. 481; Miller v. Miller, 16 Ills. 296; Munxco v. Munger, 33 N. H. 581; Weir v. Weir's Adm'r, 3 B. Mon. (Ky.) 645; Smith v. Myers, 19 Mo. 433; Guenther v. Birkicht's Adm'r, 22 Mo. 439; Morris v. Barnes' Adm'r, 36 Mo. 412; Dye v. Cerr, 15 Barb. (N. Y.) 444; Mosteller's App., 30 Penn. 473; Leavy v. Leavy, 37 N. H. 125; Murdock v. Murdock, 7 Cal. 571; Swartz v. Hazlit, 8 Cal. 118; Hack v. Stewart, 8 Barb. 213; Walkers' case, Rawle, 243; King v. Low, 1 Barn. & Ald. 181; Davies v. Davies, 9 C. & P. 87.

*Wm. A. Alexander*, for respondent.

The question in this case is, can a son recover from his mother's estate, for work and labor, without proof of an express contract? The respondent maintains that a recovery

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may be had or an action sustained on an implied as well as on an express contract; and that when such facts and circumstances are proven to a jury as to satisfy them that compensation was expected by both parties, or that the work was done under such circumstances as to render an expectation of pay reasonable and natural, a recovery may be had, and that in all cases of this character it is for the jury to determine from all the facts and circumstances of each particular case, whether there was an implied contract or expectation of compensation between the parties. The instruction given by the court declared the law favorably to appellant—*Smith v. Myers*, 19 Mo. 433; *Guild v. Guild*, 13 Pick. 130; *Miller v. Miller*, 18 Ills. 296.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding originally instituted in the Probate Court of St. Charles county. The respondent presented his claim against the estate of his mother, Mary Hart, deceased, for work and labor done and performed, and services rendered for the period of six years, and on an issue submitted to a jury had a verdict in his favor. An appeal was taken to the Circuit Court, where upon a trial before a jury the plaintiff had another verdict. The case was then carried to the District Court, where the judgment was affirmed.

The giving and refusing of instructions, and the admitting of illegal evidence, are the errors complained of. The evidence substantially shows that James Hart, the respondent, continued to reside with his mother after he had attained the age of twenty-one years and until her death, being a period of about six years; that he took charge of the small farm on which she resided, doing most of the work, and by his labor supported and maintained the family, which consisted of his mother and two sisters. The other brothers had gone away from home. When there was nothing to do on the farm he hired himself out, frequently giving the wages which he received for such services to his mother. The value of his services while he so continued to work for his mother was

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proved, but there was no evidence of any express contract that he should receive compensation therefor. Evidence was admitted that the mother had declared on different occasions, that James gave her money; that he supported the family for the last six years, and if it was not for him they would suffer, and that she did not know how she could have got along without him. This evidence was objected to.

The court then instructed the jury, that, "where services are rendered and received, a contract of hiring, or an obligation to pay, will be presumed; but a presumption may arise from the relationship of the parties that the services rendered are acts of gratuitous kindness. And in this case, it is a question for the jury, taking into consideration all the circumstances, including the nature and degree of the relationship and the circumstances in life of the parties, whether there was any implied contract for compensation; and if the jury believe from the evidence that these services rendered were acts of gratuitous kindness, then there was no implied contract and the plaintiff could not recover." This instruction was objected to; and the court refused the following instruction asked for the appellant: "If the jury believe from the evidence that James Hart was a member of the family of Mary Hart, and that as such member of the family he worked on the place, then, unless the jury further find from the evidence that a special contract for wages was entered into by and between Mary Hart and plaintiff, then the jury will give a verdict for the defendant."

The objection to the evidence received by the court we think untenable. The declarations of Mrs. Hart amounted to admissions made by her concerning the value and importance of James' labor, and the manner in which it was bestowed; and although they are of no particular weight taken by themselves, yet they were competent evidence to go to the jury for what they were worth in connection with other circumstances.

The theory of the appellant is, that where a son continues to reside with his parent after he arrives at the age of twen-

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ty-one, and performs work and labor, and renders service, he cannot recover unless he shows a special or express contract entered into with his parent for wages or compensation. This is certainly the settled rule of law in England and in some of the States of this Union. As between strangers the general rule undoubtedly is, where nothing is shown to the contrary, that whenever services are rendered and received, a contract of hiring or an obligation to pay will be implied. The mere fact, disconnected and alone, that a child resides with its parents after it has attained its majority, and performs service, will not raise an implied assumpsit. The parent is not legally entitled to the earnings of his children after they arrive at the age of twenty-one, nor is he legally bound to support them; yet if they live with him as members of his family without any contract or understanding that he shall pay for their services, or receive pay for their maintenance, the law will not imply a promise to pay on either side—*Williams v. Hutchinson*, 3 Comst. 312. But our court has held, and we consider the doctrine more in consonance with justice, that in all such cases it is a matter for the jury to determine from all the circumstances whether the services were rendered under an implied contract for wages or not. This position is also supported by many respectable authorities in other States.

In the case of *Guenther v. Birkicht*, 22 Mo. 439, it was decided that where a step-son continued to reside in the family of his step-father after coming of age, the law would not imply a contract to pay him for services rendered. Many of the decisions bearing on the subject were there quite lengthily reviewed. But Mr. Justice Ryland, who delivered the opinion of the court, is precise and particular in disclaiming the idea that a recovery could only be had on an express contract. He says: "As this case must go back to the Circuit Court, we would not be understood as laying down the law so as to require the plaintiff to produce proof of an express promise on the part of Birkicht to pay the plaintiff for his services

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after he became of age, or to produce proof of a *specific contract* for that purpose."

In *Morris v. Barnes*, 35 Mo. 412, it seems the services were rendered gratuitously, and without any expectation of payment, and the court in deciding the case merely reasserted the familiar principle, that what was intended as a gratuity cannot afterwards be turned into a charge. The law we think is well and correctly stated by Judge Scott in *Smith v. Myers*, 19 Mo. 433, that "in all such cases it will be a question for the jury, taking into consideration the nature and degree of the relationship, circumstances in life of the parties, and other matters which may affect it, whether there was any implied contract for compensation." To the same effect is the language of C. J. Shaw, "that it would be quite competent for the jury to infer a promise from all the circumstances of the case; and that although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed that if, under all circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise and a *quantum meruit*; but if otherwise, then they should find that there was no implied promise"—*Guild v. Guild*, 15 Pick. 130.

The legal principles which must control cases of this description can only be indicated. It is impossible to lay down precise or accurate rules to govern all the cases which may arise. Each case will necessarily depend on its own special circumstances. The jury having found, after considering all the circumstances, that there was an implied promise, acting under what we deem a correct and proper declaration of the law, the judgment will be affirmed. Judge Holmes concurs; Judge Fagg absent.

HENRY PENTZ, Respondent, v. FRANK KUESTER, Appellant.

1. *Landlord and Tenant—Unlawful Detainer—Estoppel.*—Under the present statutes of this State, a tenant when sued by his lessor in unlawful detainer, may show by way of defence that the landlord has parted with the title, and that as tenant he has attorned to the purchaser or assignee (G. S. 1865, ch. 187, §§ 36 & 40); but the tenant cannot set up an outstanding title, or title paramount to that of the landlord or his assigns.
2. *Estoppel—Partition—Judgment—Landlord and Tenant—Conveyances.*—A judgment in partition estops the parties to the suit and all persons claiming in privity with them. The deed made by the sheriff under an order of sale in a suit in partition is the act of the parties themselves, and the purchaser at such sale is to be treated as a grantee within the meaning of the statute. (G. S. 1865, ch. 187, §§ 36 & 40.)

*Appeal from Sixth District Court.*

*T. W. Cunningham and Voullaire*, for appellant.

I. A tenant is not estopped from showing that the title of his landlord is extinguished or transferred, and that he holds under the purchaser as his tenant, and may show that the title under which he entered has expired or been transferred—G. S. p. 742, §§ 38, 39 & 40; 6 Wend. 670; 3 Hemp. 16; 33 Mo. 292 & 105; 10 Humph. 49; Tay. Land. & Ten. § 629; Smith's Land. & Ten. p. 296, note.

II. A sale under proceedings of partition is a sale by the parties themselves—25 Mo. 575; 33 Mo. 105; 3 Ired. Eq. 347.

III. The title to the property sold and the possession are vested in the purchaser by virtue of the decree of the court and the deed from the sheriff—1 Hill. on R. Prop. 606.

IV. Derivative title from Pentz, the respondent, is admissible in evidence—G. S. p. 733, § 40; Young v. Smith, 28 Mo. 66.

V. Pentz, the respondent, being a party to the proceedings in partition, is estopped both in law and in equity from setting up any right to the property sold or to the possession thereof—G. S. p. 614, § 34; 14 Mo. 153; Forder v. Davis, 38 Mo. 115.

The several statutes of partition and landlord and tenant in *pari materia*, relating to the same subject, are to be taken together and compared in construing them, because they are considered as having the same object in view and acting upon one system—4 Kent Com. 463.

*Wm. A. Alexander & E. A. Lewis*, for respondent.

I. It is a well settled principle of law, that the tenant cannot dispute the title of his landlord—Ad. on Eject. 276, and cases cited.

II. It is equally as well as settled, that in proceedings of forcible entry and detainer, title or right of property cannot be inquired into.—R. C. 1865, p. 732, § 26; *Stone v. Malet*, 7 Mo. 158, 377; *Alexander v. Wescott*, 37 Mo. 108.

HOLMES, Judge, delivered the opinion of the court.

It appears that the plaintiff leased the premises in dispute to the defendant for one year, and gave him possession. But before the expiration of the lease, all the right, title and interest of the plaintiff in the land had been sold and conveyed to one Lewis Brecker, under a judgment and order of sale in partition in a suit in which the lessor was a party plaintiff, claiming as a tenant in common with the other parties; and upon the expiration of the term, the lessee took a new lease from the purchaser at the partition sale, and continued to hold the possession. The plaintiff brings this action of unlawful detainer against him under the statute, alleging that he was holding over wilfully and without force—Gen. Stat. 1866, ch. 187, § 3.

For his defence, the defendant relied upon the record of the partition suit, the sheriff's deed under the order of sale, and his lease from the purchaser. This evidence was introduced for the purpose of showing a derivative title from the lessor himself since the date of the lease.

The court instructed the jury for the plaintiff to the effect that the tenant could not dispute the title of his landlord, nor the court inquire into the matter of title, in this form of ac-

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tion. This was doubtless so far correct as the general rule, but it did not cover the whole case made. It did not meet the defence.

An instruction was refused for the defendant to the effect that, upon the evidence offered to prove a derivative title from the lessor to the defendant, the plaintiff was not entitled to recover.

Under the provisions of the statute (Gen. Stat. 1866, ch. 187, §§ 36-40) this evidence was admissible, and the instruction should have been given. By these sections heirs, devisees, grantees, and assigns are entitled to this remedy in the same manner as the ancestor, deviser, grantor, or assignor, and evidence or proof of rights under derivative titles since the demise is made admissible in this action. These provisions were first enacted in the revision of 1855. The older decisions bearing upon this point can no longer govern this question. *Holland v. Reed*, 11 Mo. 605; *Picot v. Masterson*, 12 Mo. 303. That a grantee of the plaintiff who had by his own act and deed made the grant could show such conveyance of the lessor's title and right of possession to himself, and maintain this action against the lessee holding over wilfully and without force as against him, there can be no doubt. There would be neither reason nor justice in requiring the lessee in such case to submit to an action of unlawful detainer before acknowledging the right of such grantee to the possession of the premises. His attornment to him must be considered as lawful and as made with the consent of the landlord.

Though the tenant could not dispute the title of the landlord, nor set up a paramount title or an adverse possession against either the grantor or grantee, nor the court inquire into the matter of title in general, it was still competent for the defendant, under the statute, to show that the plaintiff's title and right of possession had been transferred to himself since the demise. These sections of the statute have so far assimilated this proceeding to actions for rent or in ejectment, in which it was always allowable for the

tenant to show that the lessor's title had expired, or had been extinguished, or transferred to himself, since the date of his lease—*Jackson v. Rowland*, 6 Wend. 670; *Bowser v. Bowser*, 10 Humph. 49; *Binney v. Chapman*, 5 Pick. 124; *Tay. Land. & Ten.* § 629.

The proceedings in partition were binding and conclusive upon all parties to the record, and upon all those holding under them afterwards; and the plaintiff was estopped from denying that his title and right of possession had been extinguished by the transfer of both to the purchaser at the partition sale—*Owsley v. Smith*, 14 Mo. 153; *Forder v. Davis*, 38 Mo. 115. It was a sale by act of the parties themselves as well as by the judgment of the law, and not a sale *in invitum* like an ordinary sheriff's sale under execution. The partition was had upon the petition of this plaintiff; and the sheriff's deed in partition must stand upon the same footing here as if it had been a voluntary conveyance of the title by the plaintiff himself. The purchaser will be considered as his grantee, within the meaning of the statute.

The matter did not involve an investigation of the merits of the title, but only the derivation and transfer of the lessor's title to the lessee, the plaintiff's right to recover the possession as a matter of fact, and his right to maintain this action. In such case the withholding of the possession by the defendant was neither wilful nor unlawful.

This position is not really inconsistent with the decisions which hold, under the former statutes, that this action could not be maintained by a plaintiff who had never been in the actual possession, and who would be put to an action of ejectment to recover the possession, any further than the changes made in the act now require, by admitting proof of a derivation of title from the lessor, by heirs, devisees, grantees and assignees. The case of *Blount v. Winright*, 7 Mo 50, and *Hatfield v. Wallace*, 7 Mo. 112, and *Warren v. Ritter*, 11 Mo. 354, and *Holland v. Reed*, 11 Mo. 605, are no longer applicable. The same may be said of other like cases: *Dunn v. Hunter*, 25 Ala. 714; *Dwine v. Brow*, 35 Ala. 596. As against

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a mere intruder, a naked trespasser, or one entering by paramount title, or claiming under an execution sale *in invitum*, it is supposed that the true owner, or the execution defendant, might maintain this action by virtue of his actual possession, upon which the unlawful entry was made, in accordance with the authorities: Warren v. Ritter, 11 Mo. 354; Young v. Smith, 28 Mo. 65; Spalding v. Mayhall, 27 Mo. 375; Alexander v. Westcott, 37 Mo. 108; Russell v. Desplous, 29 Ala. 308. But the plaintiff here had neither the actual possession, nor the constructive possession by legal seizin, at the expiration of this lease, when the wrongful entry is said to have taken place. It is true that if, as in those cases, the derivative title could not have been investigated, or if the plaintiff had never parted with his title and right of possession, the possession of the tenant would have continued to be his possession until delivered up to him or abandoned. But by his own act and deed his title and right of possession have been transferred to the tenant since the date of the lease, and it was competent for the defendant, under the statute, to show this fact by way of defence to the action. For this purpose he is placed by the statute in the position of a defendant in an action for rent, or ejectment, who may show that he lawfully acquired the title and possession from his lessor subsequently to the demise—Tay. Land. & Ten. § 629. It amounts to an attornment with the consent of the landlord—Gen. Stat. 1866, ch. 189, § 15.

It is unnecessary to invoke either of the other clauses of this fifteenth section. We are not now called upon to put a definitive construction upon them; but, for all the purposes of this case, we may presume that the judgment or decree, there spoken of, means a judgment or decree by which the tenant may be bound, and which takes the possession away from him and his lessor, and not every judgment or decree that may be rendered against the landlord. It is very probable, also, that the latter part of the same clause refers to a sale made in the execution of a power to sell given in a deed of trust, and not to a sale under execution *in invitum* as to the owner.

But the third clause of the section respecting the attornment of the tenant to a mortgagee after forfeiture, as well as the provision concerning a sale under a deed of trust, evidently proceeds upon the principle here recognized, that a voluntary conveyance of his title by the lessor to a third person, after the execution of the lease, extinguishes both his title and possession. A tenant accepting a new lease under the grantee, in such case, must be considered as holding by the act and consent of the landlord. The allegation of a wilful and unlawful detainer is thus completely disproved. The relation of landlord and tenant no longer exists between them; and there is no unlawful entry upon any possession of the plaintiff, actual or constructive.

Under a like statute, where the remedy before the justices was suspended, if the tenant alleged a right or title accrued since the commencement of the lease by *descent*, *deed*, or *will* of the lessor, it was said that "where the relation of landlord and tenant is completely dissolved, after the commencement of the lease, either by the act of the parties or by the act of the law, the justices ought not to proceed as if that relation continued to exist," and that "where the tenant has acquired the title after the commencement of the lease, from the lessor himself, by *descent*, *deed*, or *will*, the relation of landlord and tenant is at an end, and the summary remedy to obtain possession no longer applies"—*Debozear v. Butler*, 2 Grant's Cas. 421. This was by force of the peculiar provisions of the statute. So, here, it is by force of the statute that evidence was admissible to prove a derivation of title from the lessor; and the effect of such proof, when made, must be the same in this case to the extent that it was allowed by the act. We have come to the conclusion, therefore, that the defence was good, and that the first instruction asked for by the defendant should have been given.

Judgment reversed and the cause remanded. Judge Wagner concurs; Judge Fagg absent.

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STATE OF MISSOURI *ex rel.* THE MISSOURI AND MISSISSIPPI  
RAILROAD COMPANY, Relator, *v.* THE MACON COUNTY COURT,  
Respondent.

*Constitution—Laws—Construction—Railroad Corporations—Court.*—The provision of the Constitution, art. 11., § 14, G. S. 1865, p. 43, is a limitation upon the future power of the General Assembly, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted. The law does not favor the repeal of statutes by implication. In the construction of statutes, all acts passed on the same subject *in pari materia* must be taken and construed together, and made to stand if they can be reconciled. The provision of the charter of the Missouri and Mississippi Railroad Company (Sess. Acts 1865, p. 86, § 13) authorizing the county courts of any county to subscribe for the stock of said company and to issue bonds therefor, &c., was not repealed by the Constitution, Art. XI., § 14.

*Petition for Mandamus.*

A. J. Williams, T. A. Jones, and A. L. Gilstrap, for relator.

I. There are three questions before this court for judicial determination, viz.: 1. To what extent is section 13 of the charter of the Missouri & Mississippi Railroad Company (Sess. Acts 1865, p. 86) controlled by section 30 of the general act of 1861? 2. What effect has section 14, art. 11, of Constitution upon section 13 of said charter? 3. Is section 13 of said charter repealed by section 17, ch. 63, General Statutes of 1866, p. 338?

We think the first question has been conclusively settled by this court in the case of *City and County of St. Louis v. Alexander*, 23 Mo. 507.

II. The respondent claims that the enabling act was repealed by the Constitution, not by express terms, but by necessary implication. It has been repeatedly decided that the rule of construction concerning statutory repeals by implication is applicable to the inquiry, whether any particular enactment has ceased to be in force on account of repugnancy to a Constitution—*Ohio ex rel. Evans v. Dudley*, 1 Ohio, 437,

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approved in *Cass v. Dillon*, 2 Ohio, 610; see also 8 Ohio, 398; 22 How. 364. All of these cases affirm the identity of the rule in the two clauses of repeal. (See also *Smith Com.* p. 418.)

The rule is, that repeals by implication are not favored. This rule is the result of a long course of decisions. "Although two acts of Parliament are seemingly repugnant, yet if there be no clause of '*non obstante*' in the latter they shall, if possible, have such construction that the latter may not be a repeal of the former by implication"—*Bac. Abr. tit. Stat. D.*; 4 *Gill. & Johns.* 6; *Sedgw. Const. Law*, 123; *Dwar. on Stat.* 532; 4 *How. (U. S.)* 53.

Courts are bound to uphold the prior law if the two may subsist together—2 *Barb.* 316; 5 *Hill*, 221; 10 *Barr. (Pa.)* 442; *Smith Com.* p. 879, § 757; 3 Ohio, 553; 10 Ohio, 178.

All laws not repugnant are specially saved by the Constitution—§ 13, art. 11, *Const. Mo.* In the light of this rule let us see if there is any repugnancy between the Constitution and the said section of the railroad charter; see if they are irreconcilably inconsistent with each other—so contrary that they cannot be reconciled; if there is no fair course of reasoning by which they can be reconciled. The relator contends that section 14 of art. 11 of the Constitution and the law in question are not repugnant to each other. The section refers to future legislation and to that only. It should be so construed as to have a prospective and not a retroactive effect—3 *Edw.* 464; 9 *C. B.* 551; *Broome's L. Max.* 37; 13 *B. Mon.* 19. The General Assembly it speaks of is the Assembly created by the Constitution and not any past Assembly. The acts it prohibits are not subscriptions under existing laws but the making any more such laws—2 Ohio, 618; 3 *Barb.* 332. The section acts as an inhibition upon the Legislature and not upon county courts. The section is a limitation upon the future powers of the General Assembly and not an abridgment of the powers of any past Assembly—13 *B. Mon.* 19; 3 *Edw.* 464; 9 *C. B.* 551 & 557; *Newell v. The People*, 3 *Seld. (N. Y.)* 97; *Gibon v. Ogden*,

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9 Wheat. 188; 2 Hill, 31; 4 Hill, 384; 4 Ohio, 383, 385. It has not been suggested that there is any ambiguity or obscurity in the section under consideration.

One statute is never repealed by the spirit of another—Cass v. Dillon, 2 Ohio, 612; 8 B. Mon. 11; State et al. v. City of Cincinnati, 19 Ohio, 195.

1. If the Convention intended to give section 14 a retroactive effect to disturb past legislation, to repeal laws already in force, words to that effect would have been used. This view is strongly supported by the fact that the Convention did give at least one section of the Constitution a retroactive effect in distinct terms, viz., sec. 28 of art. 4, concerning lottery tickets. The first clause of this section contains a prohibition on the General Assembly, using the same language as in sec. 14, art. 11; but the second clause reaches further and absolutely forbids the sale of lottery tickets, while the third clause forbids the drawing of lotteries and the sale of tickets even under existing laws authorizing the same; thus first limiting the power of the General Assembly, and then in express terms forbidding an act. Sec. 14, art. 11, contains the same limitation upon the powers of the General Assembly, but nowhere either in this or any other section of the Constitution is a county court forbidden to subscribe to the capital stock of corporations.

2. It is by no means an inconvenient mode of construing statutes to presume that the Legislature was aware of the state of the law at the time they were passed—Jones v. Brown, 2 Exch. 332, per Pollock, J.

The Ohio Constitution of 1851 contains a provision, the prohibitory clause of which is couched in the precise language of the prohibitory clause of our own Constitution now under consideration. This clause received a judicial interpretation by the highest tribunal of Ohio in Cass v. Dillon, in 1853, which has been repeatedly affirmed by the courts of that State in a course of decisions running through a period of twelve years prior to the passage of our own Constitution. We cannot suppose that this identity of language in the con-

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stitutional provisions of two great States was the result of chance merely; neither can we suppose that our Convention were ignorant of the interpretation which had been given this clause by the courts of Ohio. On the contrary, the presumption is that our Convention borrowed this clause from the Ohio Constitution, and that they well knew and approved of the interpretation which had been placed upon it by the courts of that State.

But it may be urged that sec. 13 of art. 11 of the Constitution prohibits the State from becoming a stockholder in any corporation, and that a limitation upon the State is *ex necessitate* a limitation upon her subdivisions. This point was much discussed in *Cass v. Dillon*, and it was therein decided that when the Constitution speaks of the State, the whole State in her political capacity, and not her subdivisions, is intended—3 Barb. 332; 13 B. Mon. 17; 2 Ohio, 616; 2 Ohio, 621-3.

The Constitution of Indiana which took effect November, 1851, contained the following provision: "No county shall subscribe for stock in any corporation unless the same be paid for at the time of subscription, nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company"—§ 6, art. 10, Const. Ind. Here is a prohibition clear and explicit which was held in *Aspinwall v. Com. of Davies Co.*, 22 How. (U. S.) to be a limitation of the power of county commissioners. Why did our Convention incorporate into our fundamental law the Ohio rather than the Indiana provision? unless it was that they intended not to disturb past legislation on the subject under consideration.

*Hall and Eskridge*, for respondent.

I. The subscription of stock is in violation of the Constitution of Missouri, secs. 3 & 14 of art. 11—39 Mo. 488; 22 How. 376-7; 2 Ohio, 640 & 643; 13 B. Monroe, dissenting opinion, pp. 41 & 48.

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II. The charter was amended—See Acts of 1865, pp. 88–9, § 14; R. C. 1865, § 17, ch. 63, p. 338.

III. There was no vested right under the charter at the adoption of the Constitution—13 B. Mon. 148; 22 How. 377. The law as it was before the adoption of the new Constitution required a submission to a vote of the people before taking the stock—Laws of Mo. p. 60, §§ 1 & 2; 18 Mo. 214–15; R. C. 1855, p. 371. § 7.

WAGNER, Judge, delivered the opinion of the court.

The question presented by the record relates to the validity of the subscription of stock made by the County Court of Macon county for the construction of the Missouri and Mississippi railroad. The relator was duly incorporated by an act of the Legislature approved February 20, 1865, and by the 13th section of its charter it is declared "It shall be lawful for the corporate authorities of any city or town, the County Court of any county, desiring so to do, to subscribe to the capital stock of said company and may issue bonds therefor, and levy a tax to pay the same not to exceed one twentieth of one per cent. upon the assessed value of taxable property for each year." The 14th section expressly prohibits the Legislature from repealing or annulling the charter, but no direct provision is made against its being altered or amended. The County Court of Macon county, on the second day of April, 1867, by an order duly entered of record, took and subscribed one hundred and seventy-five thousand dollars in the stock of the said company without first having submitted the matter to vote of the people. The present Constitution of this State, which took effect and went into operation on the 4th day of July, 1865, provides in the third section of the eleventh article that "all statute laws of this State now in force, not inconsistent with this Constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the General Assembly;" and by the 14th section of the same article it is provided that "The General Assembly shall not authorize any county, city

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or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." The Legislature at its session of 1865-6, in the revision of the general railroad law, declared that "it shall be lawful for the County Court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town, in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the State; *provided* that two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription—G. S. ch. 63, § 7, p. 338. The County Court, after making the subscription, having refused to issue the bonds, a mandamus is prayed for, and it is resisted on the grounds mainly that the action of the court was illegal and void, because the authority under which they assumed to act was inconsistent with the Constitution and the statute law of the State passed subsequent to the granting of the charter. The original charter to the company contains no provision requiring a vote to be taken as to whether stock shall be subscribed, but leaves the matter wholly discretionary with the corporate authorities of any city or town, or the County Court of any county. Prior to the adoption of the new Constitution there was no limitation on the power of the Legislature to authorize subscriptions to be made by corporate bodies, and the act must be held valid and binding unless it is repealed by virtue of the constitutional provisions before quoted, or by some statutory enactment. That there is no direct repeal is palpably evident, and it can only be impliedly repealed on account of inconsistency or repugnancy. In the rules relating to repeals, the same canons of construction apply equally to constitutions and statutes. It may be conceded as the settled doctrine, that a subsequent statute which is clearly repugnant to a prior one, and which is so clearly inconsistent that the two cannot stand together, necessarily

repeals the former one although no express words of repeal are used. But it is equally well settled that the law does not favor the repeal of a statute by implication. A later statute which is general and affirmative does not abrogate a former which is particular unless negative words are used, or unless the two acts are irreconcilably inconsistent—*Deters v. Renick*, 37 Mo. 597; *Dwar. on Stat.* 532-3; 11 *Coke*, 63; *Dyer*, 347; *Brown v. Co. Ct.*, 21 Penn. 37; *O'Niel v. Commonwealth*, id. 427; *Sedgw. Stat. & Const. Law*, 123. It is a fair presumption that if the Legislature intend to repeal a statute they will do so in express terms, or by the use of words which are equivalent to an express repeal; and a court will not, if it can consistently be avoided, adjudge that a statute is repealed by implication—*Ludlow v. Johnston*, 3 Ohio, 553; *Dodge v. Gridley*, 10 Ohio, 178.

A case raising a question very similar to the one now under consideration was presented to this court several years ago, and was thoroughly considered and examined—*City & Co. of St. Louis v. Alexander*, 23 Mo. 483. In that case an act of the General Assembly entitled "An act to reduce the law incorporating the City of St. Louis, and the several acts amendatory thereof, into one act and to amend the same," approved February 8, 1843, contained the following provisions: "The city shall not at any time become a subscriber for any stock in any corporation." By a special act approved March 1, 1851, enacted while the above general prohibition was in force, the city was authorized to subscribe to the stock of the Ohio and Mississippi Railroad Company any amount not exceeding the sum of \$500,000. An amended city charter also, entitled "An act to reduce the law incorporating the City of St. Louis and the several acts amendatory thereof into one act and to amend the same," approved March 3, 1851, contained the provisions above set forth, that "the city shall not at any time become a subscriber for any stock in any corporation"; and also the following: that "all acts and parts of acts contrary to and inconsistent with the provisions of this act, or within the purview thereof, &c., are hereby re-

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pealed." These several acts took effect from their passage. It was held that the act of March 3, 1851, did not repeal the special enabling act of March 1, 1851, and that a subscription under the act of March 1, 1851, to the stock of the Ohio and Mississippi Railroad Company, made by the City of St. Louis, was authorized by law and valid, and the city thereby became a legal stockholder in said company. The court in its opinion says: "It is a rule in the construction of statutes that all acts passed on the same subject *in pari materia* must be taken and construed together, and made to stand if they are capable of being reconciled. There is nothing irreconcilable between a general prohibition to subscribe for stock in a corporation, and a permission to subscribe for stock in a particular corporation. Nothing is more common than a general prohibition with indulgence to particular individuals." Now both the acts under consideration refer to the same subject; they are *in pari materia* and must be construed together, and effect and force should be given to both unless the repugnancy is irreconcilable. There is no such inconsistency between the acts that they may not both stand and be carried into operation. A general prohibition against subscribing for stock in any corporation may well subsist with a permission to subscribe for stock in a particular corporation. Besides, the 17th section of the general railroad law, with which the enabling act is supposed to conflict, uses no negative words. It uses words to express and permit future acts, and there is nothing to show that it intended to operate on existing or past laws even by implication. It was framed after the Constitution was adopted, and the conclusion is undeniable that it was intended simply to make the law conform to and carry out the 14th section of the 11th article of that instrument.

A question somewhat analogous on the subject of repealing acts was raised in this court in the case of the State ex rel. Vastine v. The Judge of the Probate Court, 38 Mo. 529. There the relator claimed the office of public administrator of St. Louis county by virtue of an election by the people at

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the general election November, 1866, and the judge of the Probate Court refused to approve his bond and permit him to qualify on the ground that the law making the office elective was repealed, and that the power to appoint a person to fill the office was vested in him. The law under which Vastine was elected was passed by the Legislature and approved March 3, 1857, and provided that at the next general election after the passage of the act, and every four years thereafter, the public administrator should be elected in certain counties including St. Louis, and that he should hold his office for four years and until his successor should be elected and qualified. The General Statutes declare, ch. 128, § 1, p. 515, that "each court having probate jurisdiction in any county may appoint a public administrator for its county, who shall have been a resident citizen of the county for one year previous to his appointment, and shall hold his office for two years and until his successor be qualified." Ch. 224, § 6, p. 883, of the General Statutes provides that all acts or parts of acts of a private, local or temporary nature, or specifically applicable to certain particular cities or counties, in force on the first day of November, in the year 1865, not repealed by, or repugnant to the provisions of the General Statutes, shall continue in force or expire according to their respective provisions or limitations. It was contended that § 6 of ch. 224 of the Gen. Stat. necessarily repealed the special law and vested the exclusive power of appointment in the court having probate jurisdiction; but we decided that as no negative words were used, there was not such an inconsistency as would produce a repeal by implication and prevent both laws from standing together.

The next question to be considered is, does the clause in the Constitution referred to, apply to past as well as future acts? Was it intended to place an absolute inhibition on all subscriptions to stock in railroad companies, without regard to enabling acts passed before it went into effect, or does it merely prescribe a limitation on the future power of the Legislature? It is strongly insisted by the counsel for

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the respondent that this court has already passed on the subject in the case of the St. Joseph and Denver City R.R. Co. v. Buchanan Co., 39 Mo. 485; but this is founded on the misapprehension of the opinion delivered in that case. The point was not before the court and no decision was rendered upon it. It is true that the section of the Constitution was referred to *arguendo*, and in such a manner that the inference might well arise that in the opinion of the court the Constitution forbade all subscriptions unless a previous submission had been made to qualified voters in accordance with its provisions. But the only question in the case on which the Constitution had any bearing was the manner in which the matter was submitted to a vote. By an examination of the opinion it will be seen that the act was declared to be repugnant to the Constitution on another ground and for another reason. The enabling act authorizing and empowering Buchanan County to make subscriptions of stock to the railroad company, provided that before the County Court should have power to make the subscriptions the proposition should be submitted to a vote of the taxable inhabitants of the county, and a majority of the votes polled, for or against the proposition, should be valid and binding on the county. The order for an election was not made and the vote did not take place till after the new Constitution was adopted and had become the organic law of the land. Sec. 3 of art. 2 of the Constitution defines who shall be a qualified voter, and prohibits any other from voting at any election held by the people under the Constitution, or in pursuance of any law of this State, or under any ordinance or by-law of any municipal corporation. The order of the court submitting the proposition to be voted on by the people of Buchanan county attempted to conform to the provision of the Constitution as to qualified voters, and to the act of the Legislature as to taxable inhabitants, but really was not in compliance with either, and this was held to be illegal. This was the very point adjudged, and nothing more.—The clause in the Constitution prescribing the conditions on which counties

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and corporate authorities shall be allowed to subscribe for stock in railway companies seems to have been transcribed from the Constitution of the State of Ohio. It has long been a recognized rule that when we import a law of another State into our own law, we also adopt the construction placed upon it by the courts of the State whence the law was derived. This very question has been before the Supreme Court of Ohio on several occasions and has received a uniform construction. In the first case, when the question came up (Cass v. Dillon, 2 Ohio, 607) the court was not unanimous, and Judge Ramsey delivered an able dissenting opinion, marked by sound logic and keen criticism. But the majority of the courts held that there was no such repugnancy between a law enacted before the adoption of the Constitution authorizing a subscription by a county to the capital stock of a railroad company, and the provision of the Constitution referred to; that the section plainly referred to future legislation alone, and the acts it prohibited were not subscriptions under prior or existing laws, but the making of any more such laws. The same question was before that tribunal in the case of the State ex rel. Smead v. The Trustees of Union Township, 8 Ohio, 394, and the whole court concurred in declaring: "This provision, it will be observed, does not inhibit such subscription or issuing of bonds by virtue of *existing* laws; it only prohibits the General Assembly *from passing such laws in future*, after the adoption of the new Constitution." And again: "It is however, upon this point of the case, sufficient to say, that we fully assent to the reasoning and conclusions of the majority of the court in the case of Cass v. Dillon, as expressed by the able and learned opinion delivered by Judge Thurman in that case. This court has had occasion at different times heretofore to carefully consider various objections urged to the constitutionality of statutes similar to those under consideration, and their constitutionality has been uniformly affirmed by the court. The validity of the acts of Assembly referred to, can therefore no longer be regarded by the court as doubt-

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ful"—See also 1 Ohio, 77; id. 105; 6 Ohio, 518; 7 Ohio, 327. These decisions were all rendered before our Constitution was framed, and we must suppose that the members of the Convention who drafted that instrument were familiar with the construction given to the section in question. All the authorities that we have been able to consult coincide with the above views, and it is now too late to promulgate a different doctrine. The intelligent members of the constitutional Convention were certainly acquainted with the familiar rules which obtain in the construction of laws, both organic and statutory, and also understood the force and meaning of the English language. If they had intended that the 14th section of the 11th article should operate as a complete check and effectual bar against all subscriptions to stock in associations or companies under existing laws, they would have used words unequivocal in their meaning to carry out that intention. But the words used import a future and prospective operation only. This is abundantly manifest by the language they have used elsewhere when they intended not only to prohibit the future exercise of a power, but to inhibit any further acts under laws already in existence. As an example of this we will cite a single section, though it is not the only one of the same character to be found in the body of that instrument. Section 28 of article 4 is as follows: "The General Assembly shall never authorize any lottery; nor shall the sale of lottery tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn or tickets therein to be sold." Here is not only a prohibition against an authorization of any future lottery, but a clear and effectual bar placed on those already in existence. The language is decisive and unambiguous, and evinces unmistakably that when the Constitution means to have a retroactive force, words and expressions are used plainly effectuating that object.

Upon the whole case, our conclusion is that the 14th section of the 11th article of the Constitution is a limitation on the future power of the Legislature, and was not intended to

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Robinson v. N. Mo. R.R. Co.—Singleton v. Pacific R.R.

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retroact so as to have any controlling application to laws in existence when the Constitution was adopted; and as the County Court made the subscription of stock, the company is entitled to the bonds. Wherefore a peremptory mandamus is ordered. The other judges concur.

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JOHN ROBINSON, Respondent, v. NORTH MISSOURI RAILROAD  
Appellant.

*Supreme Court—Practice—Final Judgment—Transcript.*—Stricken from the docket, the transcript not containing the record, but only the bill of exceptions, and thus not showing any final judgment in the cause.

*Appeal from Audrain Circuit Court.*

John C. Orrick, for appellant.

FAGG, Judge, delivered the opinion of the court.

In this case there is simply a bill of exceptions, without a transcript of the record of the court below. There is consequently no proper evidence of the fact that a final judgment in the cause has ever been rendered, or that an appeal was taken. The cause will therefore be stricken from the docket. The other judges concur.

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LYLE SINGLETON, Plaintiff in Error, v. THE PACIFIC RAILROAD,  
Defendant in Error.

1. *Practice—Pleading—Motion to Strike Out.*—Where the answer denies the facts stated in the petition, it is improper to anticipate a case which it is supposed the plaintiff may attempt to make at the trial, and such matter should be stricken out.
2. *Practice—Pleading—Trial.*—Where the plaintiff sues for the unlawful taking and conversion of property, he cannot at the trial recover as upon an implied contract of sale and delivery.
3. *Practice—Trial—Instructions.*—Where the evidence offered by plaintiff at the trial does not legally tend to support the allegations of the petition, it is proper for the court to instruct the jury to return a verdict for the defendant; but where the evidence offered in any manner tends to prove the issues, the court should instruct the jury hypothetically, and leave them to find upon the facts.

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*Error to Phelps Circuit Court.*

The plaintiff moved the court to instruct the jury—

1. That if they believe, from the evidence, Lyle Singleton furnished nine thousand ties, or any other number, on the line of the south-west branch of the Pacific railroad, which were by the engineer of said road rejected and were afterwards taken and used in the construction of said road, then the plaintiff is entitled to recover a reasonable compensation for the ties so used.

2. The court further instructs the jury that the contract between the Pacific Railroad Company and Diven, Stancliff & Co., between Diven, Stancliff & Co. and J. Stover, and between J. Stover & Co. and Lyle Singleton, does not affect the right of the plaintiff to recover for ties which none of those companies ever paid for, but which were used for the construction of the road.

3. The court further instructs the jury that the mere fact that the railroad company let the completion of the road to other parties, still that fact does not release the defendant from liability, provided such sub-contractors did not pay for the ties in controversy and the jury are satisfied the ties were used in the construction of said road.

4. The court further instructs the jury that if they believe from the evidence that the Pacific Railroad Company used in the construction of the south-west branch of the Pacific railroad nine thousand ties, and that the said ties were used on the road in laying the track of said road, they will find the issues for plaintiff, and assess his damages at such sum as the jury may find from the evidence has been proven as their value.

All of which the court refused.

*R. H. Musser*, for plaintiff in error.

Sec. 47, R. C., p. 1268, provides that either party may move the court "to give instructions on any point of law arising in the cause, which shall be in writing." The instruction as asked by the defendants does not contain any points of law.

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It is obnoxious to the often repeated decisions of this court as an instruction unsupported by evidence—*Harrison v. Cachelin*, 27 Mo. 27; *Clark v. Hammersle*, id. 56: as a commentary upon the evidence, it is against law as declared in *Morse v. Madox*, 19 Mo. 45; *Loehner et ux. v. Home Mut. Ins. Co.*, 19 Mo. 628; *Glover v. Duhle*, 19 Mo. 360: as an instruction to the jury, what their verdict shall be, against the doctrine in *Houghtaling v. Ball*, 19 Mo. 84; *Chappell v. Allen et al.*, 38 Mo. 213.

*Geo. E. Leighton*, for defendant in error.

I. The motion to strike out part of defendant's answer was properly overruled. Although, perhaps, not necessary to be inserted, yet it was explanatory of and a necessary part of the defence, and hence not improper.

II. The instructions asked by plaintiff were properly refused. The case is in form and in substance an action of trover, alleging the conversion by defendant of ties which had entered into the construction of the road, and become part and parcel of the realty. In such a case, no recovery can be had unless the defendant is himself the wrong-doer. No recovery can be had against the innocent holder of the realty. Conversion will not lie against a person holding property acquired innocently in a totally distinct character from that originally possessed; in other words, where the property is so changed as to have ceased, to all intents and purposes, to be the property converted—to have lost its identity—2 East. 154; 3 N. H. 484; 6 Greenl. 427; 17 Vt. 540.

FAGG, Judge, delivered the opinion of the court.

This was a suit instituted in the Phelps Circuit Court for the recovery of damages alleged to have been sustained by reason of the taking and conversion of a number of cross-ties by the railroad company, and used in the construction of the south-west branch of the Pacific railroad. There is but the one count in the petition, and the trespass is charged to have been committed directly by the company.

The answer contains a denial of all the allegations in the petition, and then proceeds to set up the fact that a contract for the construction of the south-west branch of its road was made with certain parties therein named, and that "the said contractors were to grade the bed of said road, furnish the ties and all other materials needed in said construction, for an agreed sum; and said contractors did grade and build said road, furnishing said ties and other materials: and if said contractors did use the ties of plaintiff (of which this defendant has no knowledge nor any information sufficient to form a belief), this defendant is not liable to said plaintiff for the same, but the said contractors only are responsible."

A motion was made at the proper time to strike out so much of the answer as related to the contract for the building of the road, which was overruled by the court.

We think it was sufficient to have denied the allegations of the petition. The setting up of this matter, which is certainly not responsive to the petition, seems to have been intended to anticipate a case which the plaintiff might possibly endeavor to make against the defendant by proving that the ties were taken by parties employed by the company to construct the road, and that it should therefore be held liable for their acts. We think it was unnecessary, and ought to have been stricken out. If it had been admitted by the answer that the ties had actually been taken and used in the construction of the road, and the fact was that it had been done by parties who had contracted with the company for the doing of the work, then it would have been proper to set it out in that form. The question as to the liability of the railroad company for a trespass committed by a contractor in the prosecution of his work does not properly arise in this case, and need not be discussed. As the judgment of the Circuit Court will have to be reversed, and the cause remanded for further trial, it will not be necessary to examine minutely the declarations of law asked by the plaintiff and refused by the court. The first is wholly inconsistent with the theory upon which the suit was brought. It assumes

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that if a state of facts had been proved sufficient to show an implied contract between the parties to the suit, then the plaintiff was entitled to recover a reasonable compensation for the ties. The second assumes that notwithstanding the company had contracted with parties to furnish materials and construct its road, yet, if the ties in question had actually been used, and the contractors failed to pay for them, it was nevertheless liable to the plaintiff for their value. The third is almost precisely to the same effect, and the fourth contains substantially the same proposition as the first. It is enough to say of all of them that they were properly refused.

These points being disposed of, we come now to consider the chief matter of complaint urged by the plaintiff in error. At the conclusion of the whole case, the following instruction was given by the court at the instance of defendant's counsel, and thereupon the plaintiff submitted to a non-suit:

"The defendant by attorney comes and demurs to the evidence as offered to the court, and says that it is not sufficient in law to entitle plaintiff to recover, and asks the court to give the following instruction: That the plaintiff having failed to introduce any evidence to show any liability on the part of the defendant, and no connection of any kind upon the part of the railroad company with plaintiff having been shown in any way, and no evidence of any kind in the case having been offered to show any liability or connection between plaintiff and defendant, the jury are instructed to return a verdict in favor of defendant."

It has been repeatedly held by this court that it is not improper to give an instruction of this character in a case where there is no evidence whatever to support the plaintiff's allegations. But such a case rarely happens. It is frequently a matter of great difficulty to determine what amounts to some evidence tending to prove the issue. In all such cases the better course is to instruct the jury hypothetically, and let the matter be disposed of in that way.) Here the whole case was through so far as the introduction of testimony was concerned; and rather than run any risk of invading the

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province of the jury, it would have been better to have referred the whole question to them, under proper instructions of the court.

There was no controversy that the plaintiff had placed the number of ties claimed on the line of defendant's road whilst the same was in course of construction. Although it does not appear by what authority it was done, still the evidence is uncontradicted that they were taken and used in the building of the road. We think that it would have been better to have left the jury to find from all the facts and circumstances in the case whether they were so taken and used as to make the defendant liable as charged in plaintiff's petition. To have enabled the jury to come to a correct conclusion upon that point, it would have been right to have declared the law of the case, due regard being had to the facts proved.

The judgment of the Circuit Court will be reversed, and the cause remanded for further trial. The other judges concur.



STATE OF MISSOURI, Respondent, v. JOHN MANSFIELD, Appellant.

1. *Supreme Court—Criminal Practice—Evidence—Appeals.*—On appeals or writs of error in criminal cases, the Supreme Court will examine the evidence given upon the trial, and will reverse the judgment if the verdict be not supported by the evidence.
2. *Constitution—Jury—Crimes—Misdemeanors.*—Upon the trial of parties indicted for capital crimes and felonies, the prisoner cannot waive his constitutional right to a trial and verdict by a jury of twelve good and competent jurors. In cases of misdemeanors, where the penalty is a fine merely, he may waive his right and may accept the verdict of less than twelve jurors, or submit to a trial by the court.

*Appeal from Sixth District Court.*

*Dryden & Lindley*, for appellant.

I. A defendant indicted for felony cannot be tried even with his own consent by a jury of less than twelve men. The reasons for this rule are well expressed in *Concini v.*

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State, 18 N. Y. 128 ; see also Neales v. State, 10 Mo. 498 ; State v. Moody, 24 Mo. 566.

If the defendant can consent to be tried by eleven jurors, he can consent to be tried by any less number, or by the court alone without a jury ; but any such proceeding would surely be void as contrary to the provisions of §§ 1 & 2, ch. 213, R. C. 1865, which, by limiting the right of the defendant to consent to be tried without a jury to the case of a misdemeanor, evidently denies it in cases of felony. And in construing these sections of the statute reference should be made to the case of Neales v. State, 10 Mo. 498.

II. This court will look into the record and see if the verdict of the jury is warranted by the evidence.

The rule in civil cases, that this court will not reverse although the verdict is against the weight of evidence, does not apply to criminal trials for felony. This distinction is made by the Supreme Court of Tennessee, in Davis v. State, 2 Humph. 439. The court says, "The rule that this court will not grant a new trial upon the facts unless the jury shall appear to have been guilty of great rashness, does not apply to criminal cases. In such cases new trials have been constantly granted upon its conviction that the verdicts were not warranted by the proof"—Kirby v. State, 3 Humph. 289 ; Bidford v. State, 5 Humph. 552 ; 7 id. 419 & 544. This rule seems to be recognized by this court in passing upon the sufficiency of evidence in the case of the State v. Ebert, appealed from St. Louis Court of Criminal Correction, and heard before this court at the last term. But should the court hold otherwise, still this case comes fairly under the other branch of the rule, that "this court will reverse when there is no evidence to warrant the verdict." In the trial of this case in the Circuit Court the evidence against the defendant was altogether circumstantial, and the rule in such cases is that the jury cannot convict upon a mere preponderance of evidence, nor any weight of preponderating evidence, but the evidence must be such as to exclude every hypothesis but that of the guilt of the accused—3 Greenl. Ev. §§ 29 & 137.

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If the court therefore sees that the evidence does not exclude every reasonable hypothesis consistent with the innocence of the accused, it is equivalent to an entire failure of evidence in a civil case.

*S. Voullaire*, for appellant.

A jury trial must consist of twelve jurors—*Brown v. State*, 8 Blackf. 561; *Concini v. People*, 18 N. Y. (4 Smith) 128; 7 Abb. Pr. 271.

In felony cases the defendant must be personally present during the trial—*State v. Cross*, 27 Mo. 332; *Rose v. State*, 20 Ohio, 31; *State v. Buckner*, 25 Mo. 167; *State v. Braunschweig*, 36 Mo. 397; *State v. Schoenwald*, 31 Mo. 147; *G. S. of Mo.* 1865, p. 850, § 15.

The court will examine the evidence in the cause, and grant a new trial if the evidence is not against the defendant—*State v. Bird*, 1 Mo. 585; *State v. Packwood*, 26 Mo. 340; *State v. Simms*, 2 Bailey, 29; *Copeland v. State*, 7 Humph. 470; *State v. Brosius*, 39 Mo. 535; *Webster College v. Tyler*, 35 Mo. 268; *Morris v. Barnes' Adm'r*, 35 Mo. 412; *Hart v. Leavenworth*, 11 Mo. 629.

This court will set aside the verdict in a case for the misconduct of a judge, attorney, and others—2 Whart. Crim. Law, §§ 3136 & 3157; 2 Hale P. C. 308 (marg.); *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. 296; *Fulwer v. Scott*, Whart. Dig. 355.

*B. B. Kingsbury*, for respondent.

I. The verdict will not be set aside if there is any evidence to support it—*Dodge v. Brittain*, 7 Meigs, (Tenn.) 84; *England v. Burt*, 7 Humph. 399; and the rule applies as well to criminal as civil cases—*McCune's case*, 2 Rob. 771; *Hill's case*, 2 Grat. 594. Judge Scott, in *State v. Anderson*, 19 Mo. 241, says: "We know no distinction between civil and criminal cases. When the verdict of a jury comes here endorsed by the refusal of the court which tried the cause to grant a new trial, this court will not interfere on the ground

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that the evidence does not support the verdict. Jurors are the appropriate judges of the facts as the court is of the law.

II. The trial by a jury of eleven men, by consent of prisoner and counsel, is no such error as requires the interposition of this court. No objection was made in the Circuit Court, nor was such action alleged for error in the lower appellate court. It was a provision (the trial by twelve jurors) which the prisoner might waive—Commonw. v. Dailley, 12 Cush. (Mass.) 80; Murphy v. Commonw., 1 Mete. (Ky.) 365; Tyree v. Commonw., 2 id. 1; 1 Bish. on Crim. Proc., ch. 25, § 422 et seq., § 762; Baxter v. The People, 3 Gilm. 368.

It being admitted that the accused may waive some right provided by law for his protection, the question arises whether the unanimity of a jury of twelve men—a principle which now prevails only in this country and England, and in those jurisdictions may be waived in civil cases, and recently often is waived—is such a right that he cannot waive it. This court has unquestionably observed the manner in which verdicts are forced from juries, often being only the expression, for the sake of being released from confinement, of an apparently agreed opinion on the guilt or innocence of the accused. (See opinion of Dr. Francis Lieber in October number of Law Register.) The case of the People v. Concini was one in which the prisoner was indicted for murder, and every provision *in favorem vitæ* on the trial of a man accused of a capital crime was strictly secured, and the case should not be held as authority in any except capital cases.

WAGNER, Judge, delivered the opinion of the court.

Whilst the law is firmly established in this State that it is not the province of this court in civil cases to weigh the evidence or disturb the discretion of the lower courts in maintaining or setting aside verdicts, it is equally well settled that in criminal cases we have never abandoned our right to interfere where the record shows that manifest injustice has been committed, or the verdict is not supported by the evi-

dence. We will not say here that the verdict is wholly unsustained by the evidence, but the testimony is certainly very weak on which to base a conviction. There are circumstances, it is true, which go far to identify the accused with guilty participation in the burglary and larceny charged in the indictment, but it is doubtful whether these would have been sufficient to have produced the verdict had it not been for the action of the court which will be presently referred to.

One Harrold was jointly indicted with the defendant for the same offence, and previously convicted and sentenced in the same court, and on appeal the judgment was affirmed here. Upon the trial of the defendant, the court in giving instructions for the State gave the same indential instructions which had been given in Harrold's case, with the endorsement written thereon, "Instructions by court, State v. Harrold." The counsel for the prosecution, in his closing address to the jury, was permitted to allude to the fact that Harrold had been convicted for the same offence, and that they were both in company when found directly after the crime was committed.

Now all this might well have exerted an injurious influence over the minds of the jury. The fact that Harrold and defendant were jointly indicted, and that the jury were acting under the identical instructions given in Harrold's case, would seem to warrant them in making the inference, that they had the sanction of the court for finding a verdict of guilty, without stopping to inquire whether the evidence was precisely the same in the two trials. In truth, the evidence was not the same, for there was no such evidence made to identify the defendant's tracks by measurement as there was in Harrold's case.

When the jury were called, twelve men were selected and empannelled to try the cause. On the next morning one of the jurors failed to answer, and it was stated that he was sick. It was then agreed, the prisoner consenting thereto, that the trial should proceed with eleven jurors, and accordingly the eleven jurors heard the cause and rendered

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the verdict. The question is now directly presented to the court for decision, whether upon an indictment for felony the defendant can waive his constitutional right to be tried by a legal jury of twelve men.

The 17th section of our Declaration of Rights says that the right of trial by jury shall remain inviolate. Whenever there is a constitutional guaranty of the right of trial by jury, the jury must be composed of twelve men—*Vaughn v. Scade*, 30 Mo. 600, and authorities cited in the opinion; 2 *Bennett & Heard's Lead. Crim. Cas.* 327, and note. A jury must consist of twelve men, no more, no less; no other number is known to the law, and they must appear upon the record to have rendered their verdict—*Rex v. St. Michaels*, 2 *Blackst.* 719; *Dixon v. Richards*, 2 *How.* 771; *Jackson v. The State*, 6 *Blackf.* 461; *Brown v. The State*, 8 *Blackf.* 561; 22 *Ohio*, 296. "The petit jury," says *Chitty*, "must consist of precisely twelve, and is never to be more or less, and this fact it is necessary to insert upon the record. If therefore the number returned be less than twelve, any verdict must be ineffectual and the judgment will be reversed on error"—1 *Chit. Crim. Law*, 505.

It has been held that, in mere cases of misdemeanor, the Legislature might provide for their prosecution in a summary manner, notwithstanding the constitutional declaration, that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," the clause having reference to felonies and the higher grades of crimes—*State v. Ledford*, 3 *Mo.* 73; *State v. Cowen*, 29 *Mo.* 330; *State v. Ebert*, 40 *Mo.* 186. The statute now allows a defendant to be tried by the court without a jury, in cases of certain misdemeanors, if he waives his right to have a jury; but before the enactment of this statute it was decided that the judge of a court could not try a defendant in a criminal case upon a plea of not guilty even by his consent; that a jury could alone try such a plea (*Neales v. The State*, 10 *Mo.* 498); and this opinion was held when the proceeding was a prosecution for a misdemeanor.

In Kentucky, when the prosecution is for misdemeanors, the courts hold, that where the penalty is imposed for a fine, an agreement by the defendant to be tried by a jury constituted of a less number than twelve persons, is not inconsistent with any rule of law or with public policy, and that a judgment rendered upon their verdict is valid—*Murphy v. Commonw.*, 1 Mete. (Ky.) 365; *Tyree v. Commonw.*, 2 Mete. (Ky.) 1. The reasoning in support of the opinion is, that nothing more is involved in the issue of such a case than is frequently involved in the decisions of actions in civil cases. The validity of such an agreement in the cases last named cannot be questioned. The citizen has an undoubted right to make any disposition of his money or his property which is not prohibited by law. He may, when his right to any part of it is controverted, consent to have the controversy decided by the court without the intervention of a jury, or by a majority of the jury, or by any number of persons acting in the capacity of jurors, and such an agreement would be obligatory upon him. And so in prosecutions for misdemeanor, where the penalty imposed is simply a fine, the only contest is about money and property, and the defendant may consent to waive some of the prescribed formulas of trial.

In *Commonw. v. Dailey*, 12 Cush. 80, the same doctrine is held, that, upon a trial for misdemeanor, if the defendant's counsel consent that one juror may be withdrawn and the case proceed with the remaining eleven, which consent is duly entered of record, a verdict of guilty will not be set aside because rendered by only eleven jurors. Notwithstanding the opinion of the learned Chief Justice (Shaw), whilst arguing on general principles, seems to indicate that such agreements might be upheld in almost all cases, yet he expressly limits the decision to the case under consideration, and the case therefore can only be cited as an authority, that in a trial for misdemeanor a party may waive his right to a full jury by consent. But even this proposition was denied by this court in *Neale's case*, when there was no statute authorizing such a proceeding.

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Blackstone and other legal writers call the right of trial by jury a sacred right. In *King v. Perkins* (Holt's Rep. 403, fol.), decided in 1698, Holt, C. J., said that it was the opinion of all the judges in England, upon debate between them, that in all capital cases a juror could not be withdrawn though the parties consented to it.—See also Carthew, 465; 1 Inst. 227, b.; Cro. Cas. 484.

In the trial of Lord Dacres for treason, in the reign of Henry VIII., the question was presented whether the prisoner might waive a trial by his peers and be tried by the country, and all the judges of the Court of King's bench agreed that he could not, for the statute of Magna Charta was in the negative and the prosecution was at the instance of the King. Professor Wooddeson, in his Lectures, says, the same was again resolved on the arraignment of Lord Dudley, in the seventh year of the reign of Charles I., and that the reason was that the mode of trial was not so properly a privilege of the nobility as a part of the indispensable law of the land, like the trial of commoners by commoners enacted, or rather declared by Magna Charta. And in 3 Inst. 30, it is stated that a nobleman cannot waive his trial by his peers, and put himself upon the trial of the country—that is, of twelve freeholders—for the statute of Magna Charta is that he must be tried *per pares*.

The two most recent cases decided in America deny that in a criminal case the defendant can be tried by a jury composed of less than twelve persons even by his consent, and assert that a verdict rendered against him by a jury constituted with anything less than the legal and constitutional number will be a nullity. The question arose in one case where the trial was on an indictment for murder in the first degree, and in the other where the prisoner was charged with the offence of kidnapping—*Concini v. People*, 18 N. Y. 128; *Commonw. v. Shaw*, 7 Am. Law Reg. 289.

In the former case the court draws a line of distinction between stipulations of this character made in civil and criminal cases, on the ground that in criminal prosecutions the

penalties, or punishment for the enforcement of which they are the means to the end, are not within the discretion or control of the parties accused ; for no one has the right by his own voluntary act to surrender his liberty or part with his life. Another good and sufficient reason, it occurs to us, is, that the prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege ; it is a positive requirement of the law. He can unquestionably waive many of his legal rights or privileges. He may agree to certain facts and dispense with formal proofs ; he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors ; but he has no power to consent to the creation of a new tribunal unknown to the law to try his offence. The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases ; that it shall be composed of twelve ; and a defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence. The law as to criminal trials should be based upon fixed standards, and should be clear, definite, uniform, and absolute. If one juror can be withdrawn, there is no reason why six or eight may not be, and thus the accused through persuasion or other causes may have his life put in jeopardy, or be deprived of his liberty, through a body constituted in a manner unknown to the law. Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him.

The observations of Abbott, C. J., in regard to the consent of the defendant in another matter, are equally applicable here : "I think the consent of the defendant in such a case ought not to be asked, and my reason for thinking so is, that if that question is put to him he cannot be supposed to exercise a fair choice in the answer which he gives ; for it must be supposed that he will not interpose any obstacle to it, for if he refuses to accede to such an accommodation, it will excite

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that feeling against him which every person standing in the situation of a defendant would wish to avoid"—King v. Woolf, 1 Chit. 401. So in Terry v. Buffington, 11 Ga. 337, the court says that it is the duty of courts to administer justice according to law, and it is irregular and improper to call upon counsel or parties to waive any legal right in the presence and hearing of the jury who are charged with the case. In the midst of a trial it will frequently happen that where one or more of the jurors become disabled and cannot continue to sit, that if the prosecuting attorney makes the proposition to proceed with the remainder of the jurors, the prisoner cannot withhold his consent without making an injurious impression—the very thing which, of course, the prisoner would be most anxious to avoid. The attorney for the State has no right to make any such a proposition, nor the prisoner any right to consent to it. It has been found necessary and wise to institute trial by jury as a shield and safeguard for the protection of prisoners accused of crime, and they are not to be allowed even by consent to dispense with or forego that protection guaranteed to them by law.

In case of misdemeanors created by statute, the Legislature may provide for their prosecution in a summary way and without the formality of indictment, and the accused may waive a jury or agree on a certain number; but in those offences, including capital crimes and felonies, which under the Constitution can only be proceeded with by indictment and presentment of a grand jury, and can only be tried by a petit jury, the jury must be composed of twelve persons, and their verdict must be unanimous.

The judgment must be reversed and the cause remanded. Judge Holmes concurs; Judge Fagg absent.

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Burgess et als. v. Kattleman et als.

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JAMES BURGESS *et als.*, Defendants in Error, v. HENRY KAT-  
TLEMAN *et als.*, Plaintiffs in Error.

1. *Equity—Injunction—Practice—Remedy at Law.*—An injunction will not be granted when the injury is susceptible of a perfect pecuniary compensation, and for which a party can obtain adequate satisfaction in the ordinary course of law.
2. *Landlord and Tenant—Lien—Rent—Lease—Trees.*—The lien of a landlord reserved in a lease of land rented for the purpose of cutting staves, heading, timber, cord-wood, &c., to be sold by the lessee, is not equivalent to that of a chattel mortgage, so as to preclude the lessee from disposing of the timber, &c., cut prior to the re-entry of the landlord for condition broken. Upon the re-entry, the lien will attach to whatever may be left or found in the tenant's possession on the premises.

*Error to Second District Court.*

A. Green, and F. & L. Gottschalk, for plaintiffs in error.

The injunction should not have been granted, there being no allegation of insolvency against Kattleman—20 Mo. 79. Plaintiffs had the right to replevin and trespass. The lien reserved is void, the case showing that defendants had the possession of the goods and right to sell, and therefore fraudulent—28 Mo. 173 ; 31 Mo. 445, 451 ; 34 Mo. 432 ; Brooks v. Wimer, 20 Mo. 503.

There being no allegation in the petition, nor any evidence on the part of the plaintiffs to the effect that Kattleman was insolvent, or not amply able to respond in damages for the trespass or the conversion, there is no equity in this case in favor of plaintiffs against the defendants—Jewett et al. v. Dixon, 20 Mo. 79. We therefore contend that the injunction was improvidently issued and the motion for its dissolution ought to have been sustained.

The leases which are relied upon by plaintiffs are made for the purpose of enabling the lessees to cut the timber from the premises and to sell the same, and all restrictions are to be construed with reference to this express intention of the parties: "Nothing in these restrictions however shall be

construed as preventing the sale of timber to other parties by the party of the second part in the legitimate prosecution of their business."

*J. L. Thomas*, for defendants in error.

Kattleman had both constructive and actual notice of the existence of the written lease from defendants in error to Moody and Twining; that it gave the lessors a lien upon all the staves, cord-wood, &c., manufactured from timber taken from the leased premises. He received the staves on the 5th or 6th of April, 1866, while the lease was filed for record on 27th March previous, and of this he should take notice—*R. C. 1855*, p. 364. Burgess and Thomas both informed him before he bought the staves that plaintiffs had a lien upon them and that they intended to enforce their lien—1 *Sto. Eq.*, §§ 394 to 397. Furthermore, before Kattleman can successfully interpose the plea of an innocent purchaser he must show to the court that he paid a consideration at the time; receiving property in payment of an antecedent debt is not sufficient to protect him as an innocent purchaser. In this case, Kattleman even admits in his answer that he advanced no new consideration, but received the staves in payment of a store account previously contracted.

It was not necessary to allege or prove in this case that Kattleman was insolvent. If the injury resulting from acts of defendants was irreparable, it is sufficient—20 *Mo. 99*; 2 *Sto. Eq.* §§ 930-33.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiffs against the defendants Twining, Moody and Kattleman, in the court below, for rent for certain land in Jefferson county. The land was leased by plaintiffs to Twining and Moody, at a certain specified rate, for the purpose of cutting cord-wood, staves, heading, &c. The lease contained a provision by which the lessees agreed that the lessors should have a lien upon all the timber, staves, cord-wood, &c., to secure the

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payment of the rent as it accrued, and the performance of all the covenants and conditions of the lease; and in case default should be made in the payment of the rent by the lessees, or in the performance of either of the covenants, then the lessors should have the right to forfeit the lease and to take immediate possession of the timber, staves and cordwood, and sell the same at public sale to satisfy the rent remaining due. Whilst rent was remaining due, Twining and Moody sold a quantity of the staves they had cut on the land to Kattleman, who took the same into possession and removed them from the premises; after which the plaintiffs gave notice to the defendants and proceeded to forfeit the lease, and took possession of all the staves, wood and timber remaining in the hands of Twining and Moody, and also made application for and obtained an injunction against Kattleman restraining him from using or disposing of the staves which he had purchased. At the hearing of the cause, a motion was made to dissolve the injunction, which was overruled, and the court made the same perpetual, and then rendered judgment against all the defendants. Kattleman alone excepted, and appealed. This judgment was affirmed in the Second District Court and the cause is brought here for revision.

Passing over the irregularity of the proceeding and the judgment, there are two points, the decision of which must control the case. The first is the action of the court in refusing to dissolve the injunction. The petition alleges the insolvency of all the parties but Kattleman, and makes no such averment as to him, and states further that by reason of the acts of all the defendants the plaintiffs were in great danger of losing their lien on the staves and timber, which would cause irreparable damage to them. No proof was offered for the purpose of showing that Kattleman was not entirely solvent and capable of satisfying any judgment which might be obtained against him. Where a party has a remedy at law, he cannot come into equity unless from circumstances not within his control he could not avail himself of his legal remedy. An injunction will not be granted where the injury

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is susceptible of perfect pecuniary compensation and for which a party can obtain adequate satisfaction in the ordinary course of law. That full compensation can be had at law, "is the great rule for withholding the strong arm of the Chancellor"—*James v. Dixon*, 20 Mo. 79; *Wallace v. McVey*, 6 Ind. 600; *Pusey v. Wright*, 31 Penn. 396; *Hill. on Inj.* 15. The party must be insolvent, so that an action at law would be unavailing or the injury so irreparable in its nature that the plaintiff would be remediless without the interposition of the injunctive process. Here there is not even a pretence or a suggestion that Kattleman was insolvent; and if he took or obtained property to which the plaintiffs were entitled, their remedy was perfect and complete at law, by resorting to their action of trespass or replevin. The court therefore erred in not dissolving the injunction.

The next question regards the lien which was reserved by the lessors on the cord-wood, staves, timber, and mill fixtures. And here the contract must be interpreted by taking into consideration the intention of the parties as shown by the terms of the writing with reference to the subject-matter and the business to be carried on. The lease was for three hundred and twenty acres of land, at a certain rate per acre; the first payment was to be made on the execution of the contract, and the balance in quarterly payments every three months. The contract contemplated the cutting of large amounts of wood, staves, and timber, to be used as merchandise, and surely it was not the understanding of either party that all the timber and staves got out by the lessees during the whole period of three months should be tied up and they prohibited from using or selling the same until the rent became due and was paid. The articles were to be used for trade, not only to enable the parties to make a profit, but also to pay the rent. The lease, taken in its whole scope and bearing, cannot be distinguished from a lien reserved in a lease by a landlord with a condition of re-entry. The tenant is not restrained or precluded from disposing of the goods or crops on the premises till re-entry for condition broken, and then

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the lien attaches to whatever may be left or found on the premises in the tenant's possession. This can in nowise be considered in the nature of a specific chattle mortgage, which comes within the provisions of our registration acts, but by its terms it plainly appears that the timber which was to be taken from the land was to be manufactured into staves, heading, &c., and used and sold as articles of merchandise.

We think that the court misconceived the law in perpetuating the injunction, and also in holding that the lease operated as a lien on the staves sold to Kattleman before the forfeiture was declared, and accordingly its judgment is reversed and the cause remanded. The other judges concur.

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THOMAS W. ALLRED, Respondent, v. MARK BRAY, Appellant.

1. *Trespass—Action—Damages.*—All persons who wrongfully contribute in any manner to the commission of a trespass, or who, after the same has been committed, assent to it, are responsible as principals, and each is liable to the extent of the injury done.
2. *Practice—Trial—Trespass—Evidence—Damages.*—In ascertaining the liability of a party sued in an action of trespass for taking goods, committed by several persons, it is only necessary to show that the defendant participated in the wrong done; the amount of property taken by him, if he took any, is wholly immaterial.
3. *Practice—Trial—Verdict—Excessive Damages.*—In cases where nothing appears upon the record to justify the conclusion that there was anything corrupt or improper in the amount of damages found by a jury, the Supreme Court will not interfere with the verdict even though it may seem to be too large upon the facts proved.
4. *Damages—Trespass.*—In an action of trespass for breaking open the store of the plaintiff and taking and carrying away his goods, the mere value of the goods taken is not the measure of damages. The plaintiff is entitled to compensation for the injury done.

*Appeal from Christian Circuit Court.*

The plaintiff asked the following instructions, which the court gave:

1. If defendant aided or assisted in taking the goods, or any part thereof, at the time specified, he is liable for the entire amount taken.

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2. If the defendant was then aiding or abetting or countenancing said robbery, he is responsible for the damage sustained by plaintiff.

The defendant asked the following instructions :

1. Unless the defendant was present and took, or, being absent, endorsed the taking of the goods charged in the plaintiff's petition, he is not liable for the goods taken, nor for damages for the taking of the same.

2. If the goods were taken by the public enemy, the defendant is not responsible.

3. Though the defendant may have had some of the goods in his possession, unless he had them under such circumstances as induces the belief that he intended to appropriate them to his own use, and deprive plaintiff of the property of the same, he is not liable any further than the mere value the goods he had in his possession.

4. If the plaintiff had abandoned the goods upon the approach of the public enemy, they became the property of the public enemy when appropriated by the same ; and if after such appropriation by said public enemy such enemy disposed of said goods, the parties to whom they were so disposed cannot be held responsible for the trespass.

5. If said goods were taken during the absence of defendant, he is not liable unless he is proven to have previously advised the taking, or done some act in aid thereof.

6. Defendant, if liable at all, is only liable for such goods as he actually took himself, and not liable for what said company took, unless defendant belonged to said company.

Of which the court gave the first, third, and fifth, and refused the second, fourth, and sixth.

*Krum, Decker & Krum*, for appellant.

To make a party liable as joint trespasser for the acts of others, it must be alleged and proved either that they acted in concert, or that the act of the party sought to be charged ordinarily or naturally produced the acts of the others—2

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Hill. Torts, 446-9; Brooks v. Ashburn, 9 Geo. 298; Sartin v. Saling, 21 Mo. 387.

It is error to give instructions, even if correct in the abstract, unless there is evidence to support them—Atkin v. Nicholson, 31 Mo. 91; Kennedy v. N. Mo. R.R., 36 Mo. 351; Jaccard v. Anderson, 37 Mo. 91.

In trespass for taking goods, the goods must be specifically described in the petition—2 Hill., Torts, 203.

The measure of damage in an action of trover or trespass *de bonis asportatis*, can be no more than the value of the goods at the time of the conversion. The action is brought in this instance to recover this value; no more is claimed in the petition. The measure of damage upon this petition could only be the value of the goods at the time, and not all damages sustained by plaintiff by reason of robbery—State to use v. Smith, 31 Mo. 566; Freidenheit v. Edmunson, 36 Mo. 226.

As under this form of action the plaintiff could not recover more than the value of the specific goods at the time, with interest, and as there was no evidence of value, the damages as assessed are necessarily excessive, and for this reason judgment should be reversed—Goetz v. Ambs, 22 Mo. 171.

The proof shows that the goods were taken by the public enemy, who took possession with overpowering force. Defendant did not belong to this rebel army, had no connection with it, nor can he be made responsible for its acts, which were not done by his direction or knowledge. The doctrine of assent as foundation for an action against him as joint trespasser has no application to seizure by an enemy in time of war. His assent or dissent under the circumstances would have been equally unimportant. The rebel army had confiscated the goods, and although *de jure* Allred's property might continue, *de facto* the goods were lost to him; and it seems a gross wrong to hold the defendant, who subsequently approved the trespass, not done for his benefit nor instigated by him, liable for Allred's loss. The trespass was not committed for his benefit, nor did he have any profit of it, and

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therefore the sixth instruction ought to have been given for the appellant.

*Ewing & Holliday*, for respondent.

The law of the case was properly declared in the instructions given by the court—2 Hill. Torts, 464; *Hare v. Little*, 28 Ala. 236; *Clark v. Boles*, 15 Ark. 452; *Owens v. Derby*, 2 Scam. 26.

The sixth instruction asked by defendant is manifestly erroneous. It limits the liability of defendant to such goods only as he may have actually taken himself, and excludes entirely the hypothesis of a common participation between defendant and others in the alleged trespass, and establishes a several liability therefor. It also erroneously assumes or infers his non-liability if he did not belong to "said company." Although not being a member of the company, he may have actually participated in the trespass.

FAGG, Judge, delivered the opinion of the court.

There seems to be no principle of law better settled than that all persons who wrongfully contribute in any manner to the commission of a trespass, or after the same has been committed for their benefit assent to it, are responsible as principals, and each one liable to the extent of the injury done. This was an action of trespass instituted against the appellant Bray, who, as the petition alleges, together with other persons unknown to the respondent, wrongfully took a large quantity of goods, the property of respondent, by which he was damaged in the sum of three thousand dollars.

The answer is simply a denial of the allegations of the petition. The proof shows that respondent's storehouse, situate in the town of Linden, in the county of Christian, was broken open and robbed of a large amount of goods, by a company of rebels connected with the army commanded by Sterling Price, in the month of August, 1861; that on the next day, and whilst the company was still in possession of the store, the appellant Bray was seen to come out of it with some of the

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goods in his hands, and one witness heard him remark "that it made no difference, that plaintiff (Allred) was a black republican." Only two other witnesses testified, one for the plaintiff and the other for the defendant. The second witness for the plaintiff did not see any of the goods in possession of Bray. He says: "I came into the town of Linden the morning after the rebels took possession of the place and plaintiff's store and the goods and property therein. I went into the store-room to warm; the rebels were then in possession. Defendant came out of plaintiff's house with two little pieces of pine lumber; he put them into the stove and said, 'Boys, let us have a better fire.' I did not see defendant do anything else." The last witness, after stating that he was in the town and saw the parties who broke open the store and took possession of the goods, and that Bray was not present, proceeds to say: "The defendant came there the next day. I saw him when he first came to the plaintiff's store on that day. I heard him say to the men who had broken open the store and taken the goods out, that they ought not to have done it; that plaintiff owed both parties, and was in debt; that it was wrong; that plaintiff would not be able to pay his debts." With the exception of some minor details, this was the substance of all the testimony in the case.

We pass over the question in reference to the granting of a new trial, as it does not appear to be insisted upon by the counsel for appellant.

The point as to the admission of improper evidence relates to a single expression made by the first witness on the part of the plaintiff. He states at the conclusion of his testimony that "the defendant was a rebel at the time of taking the goods." It was a fact tending to show the concert of action between Bray and the parties who actually broke open the store and first took possession of the goods. That expression, coupled with the statement heretofore quoted from the testimony of the same witness—"that it made no difference, that plaintiff was a black republican"—certainly would go very far towards showing the motives and purposes which actuated

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the defendant upon that occasion. The cause was tried by the court sitting as a jury, and there is nothing in the record from which we are at liberty to draw the inference that this statement could have operated prejudicially to the defendant.

The next point that we shall examine relates to the sufficiency of the testimony to authorize the declarations of law given on behalf of the plaintiff. In ascertaining the liability of a party in an action of this sort, it is only necessary to show that he participated in the wrong done. The amount of the property taken by him, if indeed he did take any, is wholly immaterial. It is unnecessary likewise to show what degree of efficiency he exhibited in giving aid and countenance to those who actually broke into the store and took the plaintiff's goods. It is enough if he was found to be acting in concert with the others. It is not our province to weigh the evidence for the purpose of ascertaining whether the finding of that fact was correct or not. The evidence certainly tended to prove both of the propositions contained in the instructions given for plaintiff, and there was no error in giving them. The three instructions given on the part of the defendant stated the law as favorably for him as the facts and circumstances authorized. The three instructions asked by the defendant and refused by the Circuit Court, were drawn upon the theory that the goods in question were taken by the public enemy after they had been abandoned by plaintiff, and that defendant was not connected with the military company that actually committed the robbery. It is, perhaps, sufficient to say that there was no evidence in the cause upon which these instructions could be predicated. The facts proved did not tend to show an abandonment by the plaintiff of his property, and it made no difference, in point of fact, whether the defendant was connected with the military organization of which the company spoken of was a part, or not. If he was present at any time during the commission of the wrongful act, giving aid and countenance to it, he should be held liable to the extent of the injury done. It made no difference that the defendant was not present on the day that the

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house and goods were taken possession of by this company. The possession was continued until the next day and up to the time that defendant was seen under such circumstances as tended to show his co-operation in the trespass. The entire proceeding, in legal contemplation, was but one act, and we see nothing in the record to show that the court acted improperly in the giving or refusing of instructions.

The verdict and judgment in this case was for three thousand dollars, the amount of damages laid in the petition. This is claimed to be excessive, and sufficient to authorize this court to reverse the judgment of the Circuit Court. In cases where nothing appears upon the record to justify the conclusion that there was anything corrupt or improper in the amount of damages found by the jury, this court will not interfere with the verdict, even though it might seem to be too large upon the facts proved.

Wherever damages are claimed for the doing of a wrongful act, it is right and proper that every circumstance going to show the aggravation, as well as the actual injury done, should be taken into consideration. The evidence in this case shows that the plaintiff left his home and property on the approach of the parties who actually broke open the storehouse; that his property was taken and appropriated or destroyed, and his business stopped. He was entitled to compensation for all the injury done, and the value of the goods taken is not the measure of damages in such a case—*Freidenheit v. Edmunson et al.*, 36 Mo. 226.

The other judges concurring, the judgment of the Circuit Court will be affirmed.



STATE OF MISSOURI, Plaintiff in Error, v. GEORGE W. BROWN,  
Defendant in Error.

*Supreme Court—Practice—Writ of Error—Final Judgment.*—Writ of error dismissed for want of final judgment.

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Morrison et al. v. St. Bt. Burns.—Aiden et al. v. St. Bt. Burns.

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*Error to Second District Court.*

*L. Brown*, for plaintiff in error.

FAGG, Judge, delivered the opinion of the court.

The transcript of the record in this case does not show that any final judgment was rendered in the court below. The writ of error must therefore be dismissed. The other judges concur.

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THOMAS MORRISON *et al.*, Respondents, *v.* STEAMBOAT BURNS,  
Appellant.

*Boats and Vessels—Jurisdiction—Courts.*—Boylan et al. v. St. Bt. Victory, 40 Mo. 244, affirmed.

*Appeal from St. Louis Circuit Court.*

*Rankin & Hayden*, for appellant.

*Geo. P. Strong*, for respondents.

HOLMES, Judge, delivered the opinion of the court.

This case comes fully within the decision of this court in the case of *Boylan v. St. Bt. Victory*, 40 Mo. 244, and for the reasons there given the judgment will be affirmed. The other judges concur.

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AIDEN *et al.*, Respondents, *v.* STEAMBOAT BURNS, Appellant.

*Appeal from St. Louis Circuit Court.*

*Rankin & Hayden*, for appellant.

Same.

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Ewing v. Gass.—Jones, Ass., v. Dudley et al.

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WM. L. EWING, Respondent, v. JAMES GASS, Appellant.

1. *Practice—Jury—Trial.*—It is the part of the jury to weigh the testimony and reconcile the evidence presented, and to give their verdict according to what they believe to be the facts.
2. *Practice—Trial—Instructions.*—Instructions not supported by the evidence presented, are properly refused.

*Appeal from St. Louis Circuit Court.*

P. Donahue, for appellant.

T. T. Gantt, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The question asked the witness Ewing in his examination in chief, and objected to by the defendant, was not strictly legal, though it was perfectly harmless and obviously had no influence in the determination of the case. There was some conflict in the testimony, but it was for the jury to weigh and reconcile it, and give their verdict according to what they believed to be the facts. The last instruction asked by the defendant was properly refused, because there was no evidence to support it, and the other instructions given on both sides presented the law fairly and correctly.

Judgment affirmed. The other judges concur.

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STEPHEN M. JONES, Assignee of JOHN SHELTON, Respondent,  
v. WILLIAM G. DUDLEY et al., Appellants.

*Appeal from Franklin Circuit Court.*

W. H. Lackland, for assignee of respondent.

Owens & Gale, for appellants.

WAGNER, Judge, delivered the opinion of the court.

The appellant having failed to prosecute his appeal, or file any assignment of errors in this court, the judgment in this case will be affirmed. The other judges concur.

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Rodgers v. Rodgers et al.—Marsh's Adm'r v. Bast.

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JOHN RODGERS, Plaintiff in Error, v. ALEXANDER P. RODGERS  
et al., Defendants in Error.

*Supreme Court—Practice.*—Judgment affirmed for failure to assign errors and prosecute writ of error.

*Error to Pike County Circuit Court.*

R. A. Campbell, for plaintiff in error.

Henderson & Dyer, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff in error in this case has wholly failed to file any assignment of errors, or any brief or statement, as required by law. With the concurrence of the other judges, the judgment of the Circuit Court will therefore be affirmed.

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JOSEPH P. VASTINE, Public Administrator having in charge  
the ESTATE OF JAMES C. MARSH, Plaintiff in Error, v. GEO.  
T. BAST, Defendant in Error.

*Judgment—Record—Estoppel—Equity—Fraud.*—A party who has been duly served with process, and against whom judgment has been rendered for want of proper defence, cannot invoke the subsequent interposition of a court of equity to set aside the judgment on the ground that he was not a citizen or resident of the State, and that by fraudulent misrepresentations he had been induced to come within the jurisdiction, so that process might be served upon him. The objection should have been taken by appearing in the original suit and moving to set aside the service of process as procured by fraud.

*Error to St. Louis Court of Common Pleas.*

Krum, Decker & Krum, for plaintiff in error.

At common law, the power of the court over its own judgments by default remained until one year after rendition, and was exercised whenever any irregularity was shown to exist either upon the face of the record, or, *aliunde*, without regard to merits—Hallet v. Richters, 13 How. Pr. 45; Williams v. Reel, 5 Duer, 602.

By our statute, it is provided that a party summoned, who has not appeared, may within three years (this petition was filed within the time limited) have it set aside by showing that he has a good defence—G. S. 1865, ch. 171, §§ 13 & 15.

In chancery, bills of review to open and set aside judgments constitute independent equities—Sto. Eq. Pl., § 426.

But this petition shows not only irregularity in the judgment (in this, that it was made final at the same term at which Bast was summoned), but proceeds to show that he was in nowise indebted to the defendants; that the service upon him was procured by a fraudulent conspiracy between the parties, and judgment obtained by fraud and deceit—Miles v. Jones, 28 Mo. 87; Harris v. Terrell's Ex'r, 38 Mo. 423.

Where a party is induced to come within the jurisdiction of the court by any improper means, any process against him will be set aside—Gufel v. Simonson, 3 Abb. Pr. R. 474; Carpenter v. Spooner, 2 Sandf. (S. C.) 717; Leaver v. Robinson, 3 Duer, 623; Morris v. Beach, 2 Johns. 294; Sanford v. Chase, 3 Cow. 381.

*Sharp & Broadhead*, for defendant in error.

I. The most extreme cases, and the farthest to which we think the doctrine has ever been pressed, or to which any courts have gone, is this. If a person has been subpœnaed, or prevailed upon by another, to come within the jurisdiction of a court, and while thus within such jurisdiction, out of his State, a capias or summons is served on him, he may on the return of the process appear, and on a proper showing have the return quashed. There are decisions to this extent—3 Duer, 622; 2 Sandf. 717; 2 Johns, 294; 3 Abb. Pr. R. 474.

In those cases it is well and properly held that if the party will, at the proper time, assert his wrong and ask relief, it will be given by quashing the return and freeing him from the effect of, and any further proceedings under, the process; but we have yet to learn that if the person served with pro-

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cess will voluntarily disregard it, make no appearance or defence, and wait until the case has been proceeded on by the court to judgment, any court has ever relieved or opened the case again, and think there is no authority therefor. There would never be an end to litigation if such practice prevailed.

An attempt was made to bring this petition under the principles of the case of *Harris v. Terrell's Ex'r*, 38 Mo. 421, and the case of *Miles v. Jones*, 28 Mo. 87; but the effort fails, for those and other cases of that class are on the ground of fraud, bad faith and trickery in obtaining the judgment which is attacked.

The right to have the process quashed being waived, and the party having submitted to the jurisdiction, the case must proceed under the law and practice of the court; and if there is no fraud or evil practice in obtaining the judgment, it is valid and final.

II. It was clearly legal and regular to take default for want of answer, to try the case, and render final judgment at the return term.

The terms of the court trying the case were fixed by the act (R. C. 1855, p. 1587, § 18) for the 2d Mondays of March and October of each year; this was the act in force at the time of the proceedings in question. (See also R. C. 1855, p. 1595.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff filed his petition in the St. Louis Court of Common Pleas on the 14th of November, 1864, praying to set aside a judgment rendered against him in the same court in favor of the defendant on the 23d day of April, 1863. He alleges substantially as grounds for opening and vacating the judgment, that defendant, previous to the rendition of the judgment against him, recovered judgment against Wm. S. Hillyer and others, and that an execution was issued thereon and returned unsatisfied; that he (plaintiff) was a resident

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of the State of Illinois and had never resided in Missouri, and was ignorant of the laws and judicial proceedings of this State; that Hillyer, under professions of great personal friendship, but with the false and fraudulent design of having him served with the process of garnishment under an execution sued out by the defendant Bast, induced him to come to St. Louis within the jurisdiction of the court issuing the process, and that while there he was served with garnishment by Bast to answer as the debtor of Hillyer; that when he went back to Chicago, he consulted a lawyer, who advised him that if he was not indebted to Hillyer, and had no property of his in his custody or under his control, it was unnecessary to do anything further in the premises, and that consequently he gave no further attention to the matter. He avers that a judgment was rendered against him by default, and that he had no notice of the same till a transcript of the same was sent to Chicago for collection; that Bast was a party and privy to the fraud by which he was induced to come within the jurisdiction of the court in St. Louis; that at the time of the service of the garnishment he was not indebted to Hillyer; and that he has a good and meritorious defence. The petition was demurred to, and the demurrer sustained.

The petition contains no grounds entitling the plaintiff to relief. It would not be sufficient as a bill in equity to enjoin the collection of the judgment. There is no allegation that it was obtained by fraud so as to bring it within the prior decisions of this court. The plaintiff had personal service and it was his duty to appear and make his defence. That he did not do so is attributable to his own negligence; that he was misinformed by his legal adviser in Chicago is his misfortune. No court should sanction any attempt to bring a party within its jurisdiction by fraud and misrepresentation. If the plaintiff was prevailed upon to come within the State, by false statements or fraudulent pretences, for the purpose of serving him with process, he should have appeared at the return term and made application to have the service set aside. But he cannot now be relieved against his own gross

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Marsh's Adm'r v. Moody.—Thomas et al. v. Gibson et al.

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negligence in disregarding the service. He had full opportunity to appear and make his defence, and if he did not avail himself of it, he must not complain when he reaps the fruits of his omission.

Judgment affirmed. The other judges concur.

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JAMES C. MARSH's Adm'r, Plaintiff in Error, v. MARGARET MOODY, Defendant in Error.

*Error to St. Louis Court of Common Pleas.*

*Krum, Decker & Krum*, for plaintiff in error.

*Sharp & Broadhead*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

This case is in all respects similar to the one of Marsh v. Bast decided at this term, and for the reasons given in that case the judgment will be affirmed.

The other judges concur.

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ISAAC B. THOMAS *et al.*, Appellants, v. LUCY GIBSON *et al.*, Respondents.

*Appeal from Lincoln Circuit Court.*

*A. V. McKee*, for appellants.

*Dyer & Henderson*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

No assignment of errors has been filed in this cause, nor has any attempt been made to prosecute the same. The judgment of the Circuit Court will therefore be affirmed. The other judges concur.

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State to use Daggett v. Leutzinger et als.

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STATE TO USE OF WILLIAM C. DAGGETT, Plaintiff in Error, v.  
JOHN LEUTZINGER, JOSEPH SCHNEIDER, and MARTIN KEARY,  
Defendants in Error.

*Executions—Claim of Property—St. Louis County—Officer—Bond.*—Under the provisions of the acts "concerning the duties of sheriff and marshal in St. Louis county," &c. (Sess. Acts 1855, p. 464; Sess. Acts 1858-9, p. 439), the bond, taken by the officer to secure jointly claimants filing several claims for distinct portions of the property levied on, is not void so as to authorize an action against the officer for breach of duty in not taking good and sufficient indemnification bonds. Although the bond be taken for the joint benefit of several claimants, each claimant of property can maintain his separate action upon the bond to recover the amount to which he is entitled, and evidence outside of the bond will be competent to show what property was claimed by each. The bond, although defective in not following the requisitions of the statute, is not void.

*Error to St. Louis Circuit Court.*

*Kreiter and Voorhies & Mason*, for plaintiff in error.

WAGNER, Judge, delivered the opinion of the court.

This was an action on the official bond of defendant Leutzinger, as constable in St. Louis, for a breach of condition.

The petition states that one Miller obtained a judgment before a justice of the peace against one Edward Ryland; that under the execution issued thereon Leutzinger, as constable, levied on certain property, to-wit, one rose-wood book-case and contents, one mahogany bureau, one mahogany wardrobe, and one mahogany table as the property of the said Edward Ryland. That the plaintiff Daggett, by a separate independent claim, notified the constable as required by law, that he was the owner of the bureau, wardrobe and table; and that one Stanley Ryland, on the same day, notified the constable that he was the owner of the book-case and contents by another and distinct claim. That upon receiving the notice the constable required of, and took from, the plaintiff in the execution a bond of indemnification designed to protect the claimants under the statute relating to the duties of sheriff and marshal in the county of St. Louis,

where property is levied upon under execution or attachment and claimed by third persons. That the constable took but one bond to indemnify both plaintiff and Stanley Ryland, the other claimant, and described the property therein as being owned by them jointly, by which reason the bond so taken and received by the constable was useless and valueless to the plaintiff, and that he had not faithfully performed the duties of his office, and the condition of his bond was broken.

A demurrer was sustained to this petition. The condition of the bond taken by the constable, and which it is claimed was not taken in pursuance of law, recites the judgment, execution and levy, and then states that "W. C. Daggett and Stanley Ryland *has* claimed said property according to the third section of the act of the General Assembly of the State of Missouri," entitled "An act concerning the duties of sheriff, marshal and constable in the county of St. Louis in relation to the levy and sale of such property under execution or attachment as may be claimed by third persons." The act referred to provides that when any sheriff, marshal, constable, or duly authorized officer, shall levy any execution or attachment on any personal property, and any person other than the defendant in such execution or attachment shall claim such property or interest therein, such officer may demand of the plaintiff, or his agent, in such execution or attachment, a sufficient indemnification bond, with at least two good and sufficient securities to be approved of by such officer, and may refuse to execute such execution or attachment until such indemnification bond is given. The third section declares that no claim made to personal property levied on as aforesaid shall be valid or lawful against such officer, unless such claimant or his agent shall set forth his claim in writing, verified by the affidavit of such claimant or his agent, describing the property claimed, and stating his interest therein, &c. By an amendatory act it is provided that where more than one claim is made to any property levied on by any sheriff, marshal, constable, or other duly authorized officer, the same proceedings shall take place in

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regard to each of such claims as is prescribed in regard to a claim in this act and in the act to which it is amendatory.

The only matter to be determined is, whether the constable's failure to take a separate bond from the plaintiff in the execution, when each claim was made, amounts to such a total non-compliance with the law as to render the bond a nullity and make him liable for a breach of duty. The law is sufficiently clear and precise as to the duties of officers acting under its provisions, and no difficulty can arise as to the original enactment. But it was perceived that a subsequent claim would frequently be preferred to either of the same, or at least a portion of the property levied on or attached, and hence the amendatory act points out the means by which it shall be accomplished. The whole object of the law is to secure claimants in the possession of their rights for property belonging to them and wrongfully sold, and to prevent officers acting in the line of their official duties from being involved in harassing and vexatious suits. It is contended by the plaintiff, that the bond represents the whole property as belonging to the plaintiff and Stanley Ryland jointly, and as their claims show that they claimed no joint ownership, but each separate and distinct articles, the bond is available to neither, and therefore the constable by his negligence or wrongful act having failed to take or exact a bond that the party can use as an indemnity, he must answer in damages. If the bond is so wanting in compliance with law that the plaintiff cannot maintain an action on it, to assert his claims or vindicate his legal rights, the position is doubtless correct. But we are not of the opinion that it is such a complete nullity as to have this effect. It certainly does not literally pursue the steps pointed out in the enactment; but if it substantially follows the same so as to furnish a good cause to the plaintiff whereby he will be protected in the assertion of his rights, he has no reason to complain. We see no obstacle in the way of the plaintiff bringing suit on this bond and recovering damages, provided that he can make it appear that he has been injured by the sale of his property.

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Although it appears to be taken for the joint benefit of plaintiff and Ryland, we are not aware of any insuperable objection to each bringing a separate action on it; nor will the condition inserted in the bond, that they claimed the property, preclude a recovery for what each or either is entitled to. Evidence *aliunde* the bond will be perfectly competent to show what article of the property was claimed by the plaintiff. In bringing his suit, he is not obliged to declare for all the furniture included within it.

Judgment affirmed. The other judges concur.

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WILLIAM S. FLETCHER, Respondent, v. ORLEANA C. SCHAU-  
BURG, Appellant.

*Bills and Notes—Notice—Equity—Trusts.*—A promissory note made payable to "J. C., Shff.," and endorsed "J. C., Shff.," does not of itself impart notice to the endorsee that the money was payable to J. C. in his official capacity as sheriff, or as trustee for other parties.

*Appeal from St. Louis Circuit Court.*

*Sharp & Broadhead*, for appellant.

I. The sheriff in a partition sale is trustee of the fund. He held the note taken for the purchase money of the land subject to the order of the court; he has no other authority to collect the money and pay it over under the order of the court; he could not sell the note.

II. The plaintiff took the note with the knowledge of the fact that the sheriff held it in the capacity of trustee; he became a party to the illegal act of the sheriff and acquired no title to the note.

The sheriff is merely trustee and not the owner of the note; and that he held such note subject to such order as the court may make in the suit in partition, is fully settled by the statutes and the decisions of this court—R. C. 1855, p. 1116, §§ 35, 37; *Renshaw v. Wills*, 38 Mo. 201; *Ramsey v. Brooks*, 20 Mo. 106.

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*Dryden & Lindley*, for respondent.

The word "Shff." following the name of the payee in and on the note is merely descriptive of the person of the payee, and in nowise affected the plaintiff with notice of any trust. There is no expression of any trust, nor any statement of the consideration for which given—*Freeman et al. v. Camden et al.*, 7 Mo. 298; *Bryant v. Durkee*, 9 Mo. 169; *Jeffries v. McLean's Ex'rs*, 12 Mo. 538; *Thornton v. Rankin*, 19 Mo. 193; *Trumbull v. Trent*, 5 Martin (La.) N. S., 703; *Fairfield v. Adams*, 16 Pick. 381.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff against the defendant on a negotiable promissory note. The note was given by the defendant for the purchase of land sold in partition by the sheriff, and made payable two years after date to "James Castello, Shff.," and negotiable and endorsed by the payee before maturity. The endorsement on the back of the note had the designation "Shff." appended to Castello's name, but there was nothing to show that the plaintiff as endorsee had any other notice that the payee held it in a fiduciary capacity, or that in its sale he was committing a breach of trust. The defendant resisted the payment of the note and claimed an interest in the proceeds as one of the distributees for whose benefit the land was sold. In the Circuit Court, the defendant's counsel asked the court to declare the law to be that the note itself with the endorsement thereon was sufficient to impart notice to the plaintiff that the money was payable to the sheriff Castello in his official capacity as such, which declaration the court refused to give, and then found for the plaintiff.

The instrument sued on is simply a negotiable promissory note made payable to Castello, and the abbreviation "Shff." added to his name is merely descriptive. There is nothing in the body of the note or the endorsement to apprise any one that it belonged to any other person than the payee, or

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that he held it in any capacity other than as his individual property. To have given the instruction prayed for by the defendant would have been going farther than any case that we are aware of has ever gone, and would have overturned principles of law long settled.

Judgment affirmed. The other judges concur.

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EDWARD BREDELL and ALFRED CHADWICK, Trustees, &c.,  
Plaintiffs, v. SARAH A. COLLIER *et als.*, Defendants.

*Appeal from St. Louis Circuit Court.*

WAGNER, Judge, delivered the opinion of the court.

This case is again presented to the court upon the single question whether the decree in the court below is in accordance with the judgment rendered in this court at the March term, 1867. We have examined the decree and find it in substantial compliance with the opinion and judgment of this court in the case, and the judgment of the court below will therefore be affirmed. The other judges concur.

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ROBERT MINTER, Respondent, v. PACIFIC RAILROAD, Appellant.

*Bailment—Carriers—Agent.*—A delivery to a servant or duly authorized agent of a common carrier, who is in the habit of receiving packages, is a sufficient delivery to the carrier; and the acts of the agent within the usual scope of his employment will bind the employer regardless of any private instructions, unless the party delivering the package knew of the instructions. Where a passenger delivered his trunk and a piece of carpeting to the baggage master of a passenger railroad train and received a check for his trunk, but was told that no check was necessary for the carpet as it would go safely—*held*, that the railroad company was liable for the loss of the carpet, although by the printed rules of the company the baggage master was forbidden to receive as passenger's baggage articles of merchandise.

*Appeal from St. Louis Circuit Court.*

*Geo. E. Leighton*, for appellant.

I. If there is any point established in the law of carriers, it is that before the carrier can be held responsible, the property must have been delivered to him or his proper servant—*Ang. on Car.* §§ 143-6; *Ford v. Mitchell*, 21 Ind. 54; *Packard v. Getman*, 6 Cow. 757; *Trowbridge v. Chapin*, 23 Conn. 595; *Tower v. Utica & Schen. R.R.* 7 Hill, 47; 1 *Ld. Raym.* 46; *Edw. Bail.* 446.

It must be a servant entrusted by the carrier to receive the goods, and not to one engaged in other duties—*Blanchard v. Isaacs*, 3 Barb. 388.

It must be to a servant authorized to receive it for the carriers—*Redf. Rail.* 245.

It must be delivered at the usual place of receiving similar articles, with notice to the proper servant—2 *Redf. Rail.* 46.

In an action against the carrier, the receipt being denied, such delivery must be shown affirmatively as part of the plaintiff's case. There was no such delivery in this case. Taking the plaintiff's evidence as all true, no authority was shown to exist in the person to whom it is said the property was delivered. There is no evidence that it was delivered to the proper servant, or at the usual place for receiving similar articles.

II. The first instruction given for defendant was undoubtedly the law applicable to the case. The finding is directly against the law as given in that instruction.

This case must be distinguished from that class of cases in which a custom of receiving by a particular employee, or at a particular place, with the knowledge of the carrier, has been held to dispense with proof of express authority. In such cases the carrier is estopped from denying authority in the servant, when by his own usual course he has given reason to the public to infer such authority. There is no pretence of such usage or custom here. For cases of this general

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character, see *Merriam v. Hart. & N. H. R.R.*, 20 Conn. 354; *Burrill v. North*, 2 Kern. 680; *Peckford v. Grand Junc. R.R.*, 12 M. & Welsby, 765; *D'Angier v. Deagle*, 3 Har. & J. 206; *Camden & Amb. R.R. v. Belknap*, 21 Wend. 254; *Cobham v. Doane*, 5 Esp. 41.

So far as this case and the plaintiff are concerned, the defendant must be regarded as a carrier of passengers exclusively. There was no distinct price paid or asked for the carriage of this carpet; it was not included in the price of his ticket, for that would only cover personal baggage. This delivery must be regarded, then, as a delivery to the servant individually, not to the carrier—*Middleton v. Foster*, 1 Salk. 282; 9 Wend. 85; 25 Wend. 459; 6 Hill, 586.

*Sherzer, Hunton & Moss*, for respondent.

I. The company having, with full knowledge of the character of the article to be transported, received and accepted the same as baggage, is liable. This proposition, so consonant to reason and common sense, is laid down as law in *Redf. Rail.*, 2 ed., 312, § 144; 2 id., 3 ed., 749, § 171, & 150-2, n. 2; *Great Northern Rail. v. Shepherd*, 7 Eng. Rail. Cas. 316; 21 Law Jour. 114; *Cahill v. L. & N.W. Railw. Co.*, 10 C. B. (N. S.) 170, et seq.; *Add. Cont.* 499; id. on *Wrongs*, p. 4, and cases cited in note c.

(a) A company acting through agents or servants is bound by acts of agent when within the scope of his employment—2 Kent, 6th ed., 617; *Sto. Ag.* 547; 1 *Redf. Rail.*, 3d. ed., 510, & n. p. 513.

(b) The baggage agent of the company was such agent—*Butler v. Hudson River R.*, 3 E. D. Smith, (N. Y.) 571-3; 1 *Redf. Rail.*, 3d ed., 510, & n. p. 513; 2 Kent, 621, n. a., 6th ed.; 1 *Sto. on Cont.* 206, § 134, as to what is general agent.

It certainly cannot be denied that the company may receive as baggage whatever it sees fit so to do; in other words, it may in respect to this make any contract it pleases.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his action in the court below against the defendant, as a common carrier, for the value of a piece of carpeting, alleged to have been delivered to the defendant for transportation from St. Louis to Kansas City, and by the defendant lost. The defendant denied that the carpeting was ever delivered to it, and on this fact issue was joined. The facts appear to be that, on or about the 20th of October, 1865, plaintiff came to defendant's passenger depot at St. Louis, Missouri, having with him a trunk and the piece of carpeting in controversy; that, having purchased a ticket to his destination in Kansas City, he demanded of the defendant's agent for receiving and checking baggage at the depot a check for the trunk, which was given, and at the same time asked for a check for his carpeting, when the agent told him that "it was unnecessary," that "he would strap it on the trunk; one check would do for both; it would go safely." Plaintiff then delivered the same to the baggage agent, who took it into his care and custody, but it was lost in the course of the transit and never returned to plaintiff. The trunk went safely and was duly delivered. The defendant resisted a recovery exclusively on the ground that the agent had no authority to receive the carpeting to be carried by the passenger train, and that it should have been taken as freight to another and distinct depot and carried on another train. It also introduced in evidence its instructions to baggage men, by which they were prohibited to check or receive any articles of freight or merchandise on passenger trains. On the above facts the court gave judgment for the plaintiff.

A delivery to a servant or duly authorized agent of a common carrier, who is in the habit of receiving packages, is unquestionably to be considered a sufficient delivery—Ang. on Car. § 146. But to make the common carrier responsible as such, the delivery must be made to a servant who is instructed to receive the goods and not to a person engaged in other duties—Ang. § 129. In *Blanchard v. Isaacs*, 3

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Barb. 388, a coat was delivered to the driver of a stage coach by a person not a passenger, to be delivered to another in a different place, but nothing was paid for the transportation of the coat, and the driver refused to put it upon the way-bill, saying that he had no right to do so; and there was no proof that the coat ever came to the possession of the proprietor of the stage or any of his agents; it was held that there was no delivery of the coat to the proprietor, and that he was not responsible as a common carrier for the loss. The driver of the stage coach had no authority to receive the coat, and he distinctly informed the owner of the fact. It was not put upon the way-bill nor was it taken as baggage, because the person to whom it belonged was not a passenger. Under the circumstances the proprietor was clearly not liable, and the owner knowingly sent the coat at his own risk. When there is no special contract, a common carrier is only bound to carry the passenger, with such baggage as the traveller usually carries, comprising clothing and such articles as are generally taken along for personal convenience—Ang. on Car. § 115; Sto. on Bail. § 499. But if the traveller takes with him other articles, which do not come strictly within the denomination of baggage and exposes them to view, so that no concealment is practised, and the carrier chooses to treat them as personal baggage and carries them accordingly, and a loss occurs, he will be responsible therefor—Great Northern Rail. Co. v. Shepherd, Eng. Rail. Cas. 310.

Will the fact that the company instructed the baggage master not to receive or check any article of merchandise on the passenger train exonerate them from liability? It is not pretended that the plaintiff had any notice of such instruction, or that the agent was not acting within the general line of his duty. The general rule is that "If a servant is acting in the execution of his master's order, and by his negligence cause injury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master, or was even

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contrary to his master's order"—Smith on Mast. & Serv. 157. And so Story lays down the law, that the acts of the agent bind the principal in all cases where the agent is acting within the scope of his usual employment, or is held out to the public, or to the other party, as having competent authority, although in fact he has, in the particular instance, exceeded or violated his instructions, and acted without authority (Sto. on Ag. § 443); and by the application of these elementary rules to railroad companies, it has been held to make no difference in regard to the liability of the company for the act of the servant, while acting in the due course of his employment, that he did not follow their instructions either general or special—Derby v. Phil. & Read. R.R., 14 How. (U. S.) 468.

Now, the right of the plaintiff to recover here, is because the carpeting was placed in charge of the baggage master to be transported to Kansas City. The company had entrusted to their agent authority to receive and check baggage, and have also given him power to determine what property came within that class, or description of property. The agent, in the usual and ostensible scope of his employment, received the carpeting without hesitation, and said that one check would answer for both the carpeting and the trunk; that he would strap them together and they would go safe. This was a complete reception by and delivery to the company. The plaintiff was not apprised or notified that it was against any law or regulation of the company for the article to be carried on the train on which he took passage; the person authorized and appointed for that purpose received it willingly, and any private order or instruction given by the company to its agents as to what articles should be received and checked for, could not exonerate it from liability or impair the rights of the plaintiff. The disobeying of orders on the part of the servant cannot be allowed to work an injury to innocent third persons.

Judgment affirmed. The other judges concur.

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Miller et ux. v. Graham's Adm'r.

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CHARLES W. MILLER and GEORGIANA MILLER his wife, Respondents, v. SOCRATES NEWMAN, Adm'r of JAMES GRAHAM, deceased, Appellant.

*Supreme Court—Practice—Trials—Immaterial Exceptions.*—The record showing that upon the merits, the verdict had been found for the right party, the court refuses to examine into the admission or exclusion of evidence as to matters of trivial importance or wholly immaterial.

*Appeal from St. Louis Circuit Court.*

A. J. P. Garesché, for appellant.

C. F. Burnes and Glover & Shepley, for respondents.

HOLMES, Judge, delivered the opinion of the court.

This was a demand upon an account for services of the plaintiff's wife before marriage, originally presented for allowance against the estate of James Graham, deceased, and finally tried in the St. Louis Circuit Court upon appeal from the Probate Court of St. Louis county, and the plaintiff recovered judgment for the sum of \$1,870. The defendant appeals to this court.

The instructions are not objected to. The only errors complained of refer to the ruling of the court in admitting or excluding testimony. It does not appear to us that there was any material error in this action of the court. The matters excluded or admitted were trivial circumstances, or wholly immaterial. There was no such error as would authorize a reversal of the judgment. Nor are the exceptions of sufficient importance to call for a discussion of them in detail. The merits of the case were determined by the verdict, and cannot be re-examined here.

Judgment affirmed. The other judges concur.

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JOHN A. STANTON and THOMAS W. STANTON, Respondents, v.  
THOMAS RYAN, Appellant.

*Evidence—Witnesses—Parties—Husband and Wife.*—In an action by surviving partners upon a *quantum meruit*, the answer alleging a special contract made with the deceased partner, the defendant is not a competent witness under the statute (G. S. 1865, p. 586, § 1) to prove a special contract made by himself with the deceased partner. Where the wife acted as agent for her husband in making a contract, she is a competent witness to prove the terms of the contract, although the party with whom the contract was made had deceased—G. S. 1865, p. 586, § 5. The provisions of sec. 5 are not controlled or modified by those of § 1, ch. 144, G. S. 1865.

*Appeal from St. Louis Circuit Court.*

*Sharp & Broadhead and Blackwell & Farish*, for appellant.

I. William Stanton being dead, the plaintiffs (his survivors) were not competent witnesses in their own behalf, and especially to testify on this point as to whether there was or was not a contract.

II. If they were competent for such purposes, then the defendant was alike competent on the same principle for the same purposes.

III. It was error to refuse permission to defendant to testify as to the agency of his wife in the transaction.

IV. The wife was permitted to testify to the agency and some acts done under the agency; and it was fatal error to refuse her testimony as to the plaintiff's bid for the work and contract made by her as agent with them, and the facts and transactions thereunder.

The first and second propositions considered together involve the proper construction of the first proviso of § 1, ch. 144, p. 586, Gen. Stat. Where one of the original parties to the contract or cause of action is dead, the other party shall not be admitted to testify in his own favor. This is a very loose, vague and uncertain provision. What is meant by "one of the original parties to the contract or cause of action"? If there are but two contracting persons—one

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party of one part, the other party of the other part—then it is plain and intelligible ; but if three persons jointly as partners are parties of one part to a contract or cause of action, all equally active, present and participating, and one of them dies, has one of the original parties to the contract or cause of action died ? Or has only one person of those who were “ one of the original parties to the contract ” died ? Two or twenty persons of the party of one part to a contract may still live and prosecute their suit against one person (the party of the other part) ; and because one of the plaintiff's co-contractors has died, can it be that the Legislature intended that this party of the other part (defendant) is thereby rendered incompetent ? It would be unreasonable, and the statute does not so declare.

But if this construction is contended for, then we say, in carrying out that construction, if the death of one of several co-contractors excludes the other party, surely it excludes the survivors also ; for, clearly, the object of the proviso was only to exclude the evidence of one party to the transaction, unless that of the other or adverse party to the transaction could be heard ; and if one will not be heard, the other will not.

The court below, it will be seen, permitted two of the three co-contractors of one part to testify on all matters, and then refused the other party the right to do the same ; and, more strange, the court seems to have compromised the question by permitting defendant to testify in his own favor as to many facts and matters and some branches of the defence, and refusing it on others, when the language of the statute is express, that, if the state of facts exists contemplated by the proviso, then he is not admitted to testify in his own favor. If, then, he was competent in his own favor, he was to all points and for all purposes a witness ; he was either competent or incompetent to be a witness, to give all or no evidence relevant. If, then, the plaintiffs were not competent to testify for themselves, both they and defendant should have been excluded. And, clearly, if they were competent,

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the other party was alike competent. In either construction, the court misapprehended the statute. But, in any view or construction, there is no authority for the ruling of the court, that the plaintiffs were competent for all purposes; and defendant was competent as to some points of defence, but not as to others; for he was either competent or incompetent generally, as a witness in the cause, as to any and all legitimate matters of defence.

II. As to the refusal of the court to permit Mrs. Ryan to testify to the transactions which were had and conducted by her as the agent of her husband, we have never been able to learn upon what ground it was based. The agency, and the fact that the transaction was had and conducted by her, were fully shown and not disputed—G. S. 1865, p. 587, § 5.

It cannot be claimed that the death of one of the plaintiffs, or even of all the plaintiffs, can affect her competency in such case, for there is no proviso, condition or qualification of the kind as to her.

A married woman has not been disqualified on the ground of interest, but on account of her legal and social relation to her husband. It was against the policy of the law that this social relation should be disturbed or endangered by permitting or compelling the wife to testify for or against her husband, generally; the well-being of society and of the commonwealth forbade it. The 5th section is designed to modify and change this in the cases specified in that section, and has no relation to any other section of the act. It plainly removes this disqualification in precisely the case before us by the third clause of the section. And the only proviso to this 5th section is, that the married woman shall not testify as to admissions or conversations of her husband.

*Cline, Jamison & Day*, for respondents.

This record presents but a single point. Did the court below err in excluding the wife of defendant from testifying to matters of conversation occurring between her and John A. Stanton, deceased, plaintiff? he being the party with

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whom the contract was made for building the house for which the suit was brought and the recovery had below.

The court below held, that as the contract for the work and labor and materials sued for was made with John A. Stanton, now deceased, the defendant Thomas Ryan could not be permitted to testify to matters occurring between himself and the deceased—G. S. 1865, § 1, p. 586.

The court further held, that under the 5th section, the wife, whether a party or not to the record, must be disabled from testifying concerning all matters about which the husband is inhibited from speaking; otherwise, if the wife be a party with her husband, she could by the 5th section testify about matters occurring with deceased parties, or those who have since become insane, &c.

This statute must be construed with a view of the general law of the land, by which the two spouses for most purposes are held and regarded as one person, and hence the disability of a party to testify to matters with persons since deceased or insane, equally attach to his wife whether she be a party with her husband or no.

The court is called upon to construe this statute in this case for the first time; and we think the court below gave to it a safe and just interpretation, and clearly expressive of the intention of the law makers.

WAGNER, Judge, delivered the opinion of the court.

The questions presented by the record and which are submitted for our consideration grow out of the statute in relation to witnesses. There was no error in allowing the plaintiffs as surviving partners to testify, as the action was brought on an account or *quantum meruit*, and the defendant had the right, and full opportunity was afforded him, to interpose his own testimony in opposition to theirs. But he went further and sought to set up a contract for the erecting of the building made with the senior partner of the firm, who was dead at the time of the trial, and to sustain this contract offered himself as a witness. He was objected to and excluded by

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the court. The Gen. Stat. § 1, p. 586, removes the disabilities heretofore existing by which parties to the record were forbidden to testify, and allows them to become witnesses for themselves and in their own behalf; subject, however, to the limitation, that in actions where one of the original parties to the contract or cause of action in issue, and on trial, is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor. The great object and purpose of the law was to destroy the restrictions and incapacities which operated as rules of exclusion by the law of evidence, and to permit every person, inclusive of parties, to give evidence; to allow all, without regard to interest, even though they were parties to the suit, to disclose all the facts within their knowledge or possession, and let whatever credibility they might be entitled to be passed upon by the jury. This may be calculated to draw forth the truth, though we entertain serious doubts about the wisdom of the enactment. But it was seen that, where one of the parties was dead, or disqualified by reason of insanity, that the parties would not stand on an equal footing, he would be unable to oppose his oath to that of the opposite party, and therefore the party living or sane was precluded from testifying.

The elder Mr. Stanton, the senior partner, with whom the contract was alleged to be made, was dead, and according to the spirit and intention of the law it was not competent for Ryan, the defendant, to introduce himself as a witness to prove the contract. The suit was not instituted on the contract; it was denied that any contract existed; the surviving plaintiffs knew nothing about it; and to permit Ryan, by his own testimony, to come in and set up, and prove its terms, when Stanton's lips were sealed by death, and could not be there to contradict, qualify or explain his statements, is at war with justice, and certainly not authorized by law.

The defendant offered to prove that his wife, acting as his agent, attended to the erection of the building and let out the contract for the same, and then proposed to prove by her that she contracted with the deceased Mr. Stanton to do the

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work and furnish the material, and the price and terms stipulated between the parties. This the court rejected on the ground that the wife was necessarily disqualified with the husband. The fifth section of the act already referred to provides that no married woman shall be disqualified as a witness, in any civil suit or proceeding prosecuted in the name of or against her husband whether joined or not with her husband as a party, in matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband.

In support of the decision in the court below, it is contended that as the husband was incompetent on account of the death of the adverse party, with whom the contract purported to be made, the wife could not be admitted to testify to prove a contract when the deceased party was powerless to be heard on the other side. This view of the question might furnish excellent reasons for changing or modifying the law; but if the statute declares differently, we are not warranted by judicial legislation in perverting the plain meaning of the statute to conform to what we might consider sound policy. It cannot be gainsaid that if the defendant had given a full delegation of power to an ordinary agent to make a contract for and superintend the building, that such agent would have been competent to prove the contract when a dispute arose concerning the same, whether the person with whom he contracted was dead or not.

The statute expressly authorizes the wife to give testimony in all transactions where she acted in the matter as agent for her husband, whether she is joined with him as a party to the record or not. There is no distinction recognizable between her and any other agent as regards capacity to be a witness. The fifth section relating exclusively to married women testifying, is independent and complete within itself, and is not controlled or qualified by the first section. If an agency were proved, we think the testimony of Mrs. Ryan should have been admitted. The case must therefore be reversed and remanded. The other judges concur.

ALFRED K. FASSETT, Respondent, v. ALONZO D. FASSETT and  
JOHN W. SMITH, Appellants.

1. *Arbitration—Awards.*—Upon a written agreement to submit matters in dispute to arbitration, the arbitrators must be sworn, or the award will be invalid.
2. *Practice—Pleading—Award—Arbitration.*—A replication to an answer setting up an award, denying the allegation of the answer, and stating that there never was any award made that had any binding force or validity, is sufficient.

*Appeal from St. Louis Circuit Court.*

*Krum, Decker & Krum*, for appellants.

*M. C. Day*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought his suit to recover the value of his interest in a certain leasehold, being for the unexpired term of two years and nine months. The parties were originally partners in trade, and while prosecuting their business as co-partners acquired the lease, and upon a dissolution of the firm they were unable to agree as to its value for the time it had to run. They entered into a written agreement to submit the matter to three persons as arbitrators, but the persons designated to make the award were not sworn. Two of them met and made a valuation, but afterwards one of them deposed that he had made an error in his calculation and that the lease was worth greatly more than the paper he had signed showed. This suit was brought on a *quantum meruit*, and the defendants in their answer pleaded the award as a bar to the action. The plaintiff in his replication denied that there was any binding or valid award. On the trial, the court excluded the evidence of the award made by the arbitrators because it was a submission in writing and not sworn to by them.

This court has held that an agreement in writing to submit matters in dispute to arbitrators is a submission within the statute, and a neglect by the arbitrators to take the oath

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prescribed by the statute renders their award invalid—Walt v. Huse, 38 Mo. 210 ; Toler v. Hayden, 18 Mo. 399. If the award is then invalid, it is nothing more than waste paper, and cannot become competent or available to either party.

But it is urged that the plaintiff did not sufficiently deny the averment of a valid award set up in the answer, and therefore no issue was made by the pleadings. It is true a defence cannot be made at the trial, by evidence, unless it be presented by the pleadings ; but we are of the opinion that the replication here was sufficient, and clearly raised the issue. It denied the allegation of the answer, and stated there never was any award made that had any binding force or validity against the plaintiff. It was reasonably explicit and fully apprised the defendants of the objection made.

There is nothing in the point that the damages are excessive. The judgment is for considerably less than the estimate placed upon the value of the interest by a large majority of the witnesses. Had it been for more, it would have been well supported by the evidence, and we would not have interfered. We see nothing exceptionable in the instructions of the court, or in its action with regard to the exclusion or admission of testimony.

Judgment affirmed. The other judges concur.

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PATRICK LEAHEY, Respondent, v. JOSEPH DUGDALE, Adm'r of  
FRANCIS DUGDALE, Appellant.

1. *Practice—New Trials—Mandamus.*—The Supreme Court will review the discretion of the inferior court in granting a new trial, only upon a proper application, by *mandamus*. In granting a new trial, the court is not necessarily confined to the grounds enumerated in the statute.
2. *Contracts—Assignment—Notice—Payments.*—After the debtor has received notice of the assignment of a chose in action, any payments made by him to the assignor, either directly or upon garnishments, are made at his peril.

*Appeal from St. Louis Circuit Court.*

*Garesché & Mead*, for appellant.

*T. G. C. Davis*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This case appears to have been twice before this court already—27 Mo. 437; 34 Mo. 99. On the first occasion it was decided that the contract was assignable; and on the second, that the defendant was not entitled to credit for payments made after notice of the assignment. Upon a new trial below, a verdict was given for the defendant. This verdict was set aside on motion, a new trial granted, and the matter referred to a referee to state an account, the defendant excepting. Upon the report being made, judgment was rendered for the plaintiff for the balance found due him.

The case came originally by appeal from the St. Louis Probate Court upon a demand against the estate of the deceased, and there were no formal pleadings. The demand and offsets involved many items, and it was essentially a matter of account. The previous decisions had settled the principles, so far, upon which the account was to be adjusted, and it was more properly a case for a reference than for a trial by jury.

It is assigned for error that the court below overruled the defendant's motion for a judgment on the verdict, and granted this reference. This court may review the discretion of the inferior court in granting a new trial, but it can be done only by *mandamus* on a proper application—Boyce v. Smith, 16 Mo. 317; Hill v. Wilkins, 4 Mo. 86.

It is objected also that it was not one of the grounds for a new trial, that the case should have been sent to a referee, and not to a jury. But it has been held that the court is not necessarily confined, in granting new trials, to the grounds enumerated in the statute—Fine v. Rogers, 15 Mo. 315. There was nothing in the action of the court on this matter which can now be assigned for error here. Exception was taken to the report of the referee for the exclusion of certain items, being mere due-bills for work done by hands employed, which were found in the possession of the defendant at his decease; but there was no evidence to show when he paid them, nor that he had ever in fact paid them. It appeared

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only that he had been in the habit of paying money on such due-bills. The time of payment was essential here. The report allowed all offsets which were proved to have been paid before notice of the assignment, and excluded those which were paid after notice. These items were rejected for want of proof that they had been paid before that date. In this the referee was correct. The burden of proof was upon the defendant, and his evidence failing, he must bear the loss if there were any. No error has been pointed out in the report that would authorize a reversal.

It has been strongly insisted in argument, that the defendant had a right to repudiate the assignment, disregard the notice, and continue to pay only on the orders of the assignors, and that he had a right to acknowledge his indebtedness to them upon subsequent garnishments. This point has already been decided against him—34 Mo. 99. It is too clearly against repeated decisions to admit of question now. Payments made after notice were made at his own peril, and he cannot complain if he is compelled to pay twice. Objection is taken also to the credibility of the witness by whose testimony the date of the notice was mainly fixed; but his veracity was not impeached, and there is no ground on which we could say that he ought not to have been believed.

There being no error of which the defendant has a right to complain, the judgment will be affirmed. The other judges concur.

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B. N. STEINBERG, Appellant, v. ADOLPH GEBHARDT, Respondent.

1. *Contract—Services—Damages.*—In actions upon contracts for services rendered, the compensation agreed upon is *prima facie* the measure of damages when the defendant refuses to permit a performance on the part of the plaintiff.
2. *Supreme Court—Practice—Verdict—Jury.*—The Supreme Court will not weigh the testimony, to ascertain whether the jury found too much or too little in assessing the amount of damages sustained by the plaintiff.

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*Appeal from St. Louis Circuit Court.*

This was a suit on a contract by which defendant employed plaintiff, as real estate agent at St. Louis, to sell within three months a house and lot of defendant's. Plaintiff advertised the house and lot for sale. The defendant Gebhardt sold the house and lot to his tenant for \$7,500 without informing plaintiff. After the sale by Gebhardt, and within the three months specified, plaintiff found a purchaser of the house and lot at the price of \$8,000. Plaintiff sued for the amount of commissions of  $2\frac{1}{2}$  per cent. of the sum of \$8,000, less the printer's fee, which Gebhardt had paid.

The plaintiff asked this instruction :

"If the jury believe from the evidence that the defendant made a contract with the plaintiff on the 26th day of September, 1865, for the said plaintiff, within three months after making of said contract, to sell the real property of defendant in petition mentioned at the sum of \$8,000 ; and further find that defendant, within three months, prevented plaintiff from selling said property by selling it himself for a less sum, then the jury will find for plaintiff the price agreed on for commissions as the measure of plaintiff's damages."

The court refused to give this instruction, but gave of its own motion the following :

"If the jury find for the plaintiff, they will give him as much as the services he rendered were worth ; but in fixing the value of his services, the jury will consider what he was to get for selling the property (if he had sold for \$8,000), and will allow him such a portion of the price agreed on as they think just and proper."

*J. A. Beal*, for appellant.

*Gottschalk*, for respondent.

FAGG, Judge, delivered the opinion of the court.

In the former cases adjudicated in this court, it has been held, that in actions upon a contract for services rendered

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where the amount of compensation is fixed by its terms, such sum is *prima facie* the measure of damages when the defendant refuses to permit a performance on the part of the plaintiff. Such refusal is to be taken as equivalent to a performance for the purpose of maintaining the action—Pond v. Wyman, 15 Mo. 175; Nearn v. Harbert, 25 Mo. 352. If, however, the failure to perform the contract results from the act of the plaintiff, it is always competent to prove such a fact, and leave the jury to say upon the evidence whether any damage was sustained or not. In this case there was some evidence tending to prove a settlement between the parties and a payment in full of all the damages claimed.

It is not the province of this court to weigh the testimony for the purpose of ascertaining whether the jury found too much or too little. In the instructions given, the court very properly told the jury that it was their province to find the amount of damage, if any had been sustained, and that they were not at liberty to go beyond the amount fixed by the contract sued upon. The jury found for the plaintiff in the sum of twenty-five dollars, and we shall not disturb the verdict. The instruction asked on the part of the plaintiff was properly refused.

The other judges concurring; the judgment will be affirmed.



ABRAHAM MCPIKE, Plaintiff in Error, v. WILLIAM M. MCPHERSON, Defendant in Error.

1. *Contract—Bond—Assignment—Cause of Action.*—Any party to a chose in action originating in contract, may in equity assign his several interest in the contract without affecting the rights of the parties interested with him. A bond was given to A. and by him assigned to B. and C., who instituted suit against the obligors; C. assigned his interest in the bond and suit to the obligors: *Held*, that B. had no cause of action against C., and that the assignment of B. was equivalent to a payment to him by the obligors of the amount due him, and that B. still retained his right to recover of the obligors the sum due to himself. (R. C. 1855, p. 1217, § 1, & p. 322, § 4.)

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2. *Practice—Assignment—Change of Interest—Judgments.*—Where one of the plaintiffs in a suit assigns his interest in the cause of action to the defendants, the remaining plaintiffs may proceed with the suit, and recover the judgment to which they are entitled. The court may give judgment for or against one or more of the plaintiffs, and determine the ultimate rights of the parties on either side. (R. C. 1855, p. 1278, § 2.)

*Error to St. Louis Circuit Court.*

*Duke & Holliday*, for plaintiff in error.

*Glover & Shepley*, for defendant in error.

If the assignment had been proved as alleged, it was an assignment of only McPherson's interest; it does not purport to assign more, and there is no principle of law that gives it greater effect. It is assumed to be absolutely certain that McPherson's interest in the notes, bond, and suit, was assignable—*Lyon v. Lyon*, 4 Bibb. 438; *Ellege v. Straughan*, 2 B. Mon. 82; *Bank v. Trimble*, 6 B. Mon. 599; *Gamble v. Johnston*, 9 Mo. 605; *Sto. Eq. Pl. § 349*; *Munsel v. Lewis*, 2 Denio, 224; *Hodgman v. W. R.R. Co.*, 7 How. Pr. 493; *Lawrence v. Boyard*, 7 Paige, 76; *Hinkle v. Wanger*, 17 How. (U. S.) 368; *Field v. Mayor, &c.*, 2 Seld. 179, 187; *Emmons v. Com., &c.*, 3 Barb. 243; 15 How. 128; *Comegys v. Vasse*, 1 Pet. 213; *Durgand v. Ireland*, 4 Kern. 322; *Bowdoin v. Coleman*, 3 Abb. 431.

Since the law permitted McPherson to assign his interest, and the assignment was legal and fair, it could not make that assignment enure to pass Anderson's interest which it did not permit him to assign, nor could it fix any penalty on McPherson for exercising a lawful right. The Missouri statute has virtually enacted that any party to a suit may assign his interest in it, and has defined the consequences that attach on such an act, viz., that the suit may go on in the name of the assignor, or the assignee may be substituted, and this is all—R. C. 1855, § 24, p. 1275.

Once the law was such, that when two plaintiffs joined in an action, both must recover or none—1 Chit. Pl. 56. The action was a unit, and could not be divided. But now the

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law is changed: one plaintiff may have judgment, while another fails; and judgment may be rendered in favor of one defendant, and against another defendant—G. S. 1865, § 2, p. 680.

The assumption of the plaintiff, that an assignment by McPherson of his interest defeated Anderson's suit, has therefore no foundation. It could not even defeat McPherson's action; but the judgment of record would be for the benefit of the assignee. If, however, the court had dismissed the suit as to McPherson, Anderson was nevertheless entitled to his judgment for half the claim. If Anderson saw proper he could have renewed his action in his own name, or he could have appealed from the judgment by which his suit was dismissed.

HOLMES, Judge, delivered the opinion of the court.

It appears that William H. Pritchardt was the holder of certain notes secured by a deed of trust on a steamboat; that Lewis A. Welton as principal, and Nicholas Springer and Thomas M. Wannell and others as sureties, executed a bond to Pritchardt, in consideration that he would release the boat, conditioned that they would pay the notes at maturity; that the notes and bond were assigned by Pritchardt, after maturity of the notes, to John J. Anderson and the defendant McPherson, who instituted suit upon the bond against the obligors, and that, pending the suit, McPherson executed an assignment, with blanks for the names of the assignees, of all his interest in the bond and in the action, and delivered the same to an attorney of Springer and Wannell; and there was conflicting testimony upon the question of fact whether their names were agreed to be inserted in the blanks as assignees. The blanks were in fact filled with their names and the assignment was delivered to them. It was alleged that this transfer was wrongful and fraudulent as against Anderson, and defeated his right to recover in the suit on the bond; and it is averred that afterwards Anderson transferred his interest in the matter, and his right of

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action against McPherson, to the plaintiff; and the plaintiff prays judgment for damages against the defendant to the amount of one half the notes aforesaid. •

The court instructed the jury for the defendant, that if the blanks were filled up with the names of Springer and Wannell against the consent of McPherson, they would find for the defendant. Instructions were refused for the plaintiff, to the effect that he was entitled to recover on the case made. The verdict was for the defendant.

The case may be determined upon the question of the effect of the assignment of the interest of McPherson in the cause of action. This interest was clearly assignable. It was a chose in action arising out of contract—*R. S. 1855, p. 1217, § 1*. Where the right of action on a covenant by two persons was indivisible and could not be assigned in part, and the plaintiff had assigned his interest as against one of the defendants, it was held that the right of action still remained in the plaintiff—*Lyon v. Lyon, 4 Bibb. 438*. The assignment by McPherson did not extinguish the cause of action—*Ellege v. Straughan, 2 B. Mon. 82; Bank v. Trimble, 6 B. Mon. 599*. On the part of the defendants Stringer and Wannell, it amounted to no more than a payment by them of one half of the demand. As to the bond sued on, it was to be considered, not as an assignment of the instrument itself, but as an equitable assignment of the interest of the assignor in the proceeds of the suit. Such assignments are good in equity—*Field v. Mayor, &c., 2 Seld. 179; Hinkle v. Wanger, 17 How. (U. S.) 368*. The assignee might sue in his own name—*Dobyns v. McGovern, 15 Mo. 662*. The defendants could not avail themselves of the plaintiff's want of interest—*Labeaume v. Sweeny, 17 Mo. 154*. If the transfer had been the consequence of the death or other disability of the party, the legal representatives might have been substituted as plaintiffs; and the statute provided that in case of transfer of any interest otherwise than by death or such disability, the action might be continued in the name of the original party, or the court might allow the person to whom

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the transfer was made to be substituted as plaintiff in the action—R. S. 1855, p. 1275, § 24. Here the assignees were already parties defendant, and there was no need of any substitution of other parties. The suit might have proceeded in the name of the plaintiffs. The assignment may have been a good defence, so far, to the action by way of payment; but the other half might have been recovered to the use of Anderson. Under the practice act, there would have been no difficulty in the matter of the judgment to be rendered. The court could give judgment for or against one or more of the plaintiffs and determine the ultimate rights of the parties on either side—R. S. 1855, p. 1278, § 2. It was therefore wholly immaterial whether the interest of McPherson in the cause of action had been effectually transferred or not, and there was no error in the instruction given for the defendant. For the same reasons, the instructions for the plaintiff were rightly refused. The verdict was final upon the matters of fact. The party had a lawful right to assign his interest in the matter, and there was no ground of damages against the defendant.

The judgment appears to have been given for the right party, and will be affirmed. The other judges concur.

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JOHN P. CAMP, Respondent, v. GARRETT BYRNE and the ST. LOUIS, CAIRO AND JOHNSONVILLE PACKET COMPANY, Appellants.

*Corporations—Powers—Members—Estoppel.*—A corporation cannot be organized nor act without the limits of the jurisdiction of the State creating it. All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the State granting the charter, are wholly void; but a subscriber to the stock of a corporation thus illegally organized, who has given his note for the amount subscribed, may by his acts be estopped from denying the legal existence of the corporation, when sued by a *bona fide* endorsee for value before maturity.

*Appeal from St. Louis Circuit Court.*

Defendant asked the following instructions, which were refused:

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1. The defendant asks the court to instruct the jury, if they believe from the evidence in this case that the defendant Byrne's signature to the notes sued on was obtained by false and fraudulent representations of any persons acting or assuming to act as the agents of the St. Louis, Cairo and Johnsonville Packet Company, and that the plaintiff Camp had notice of the same, direct or indirect, sufficient to put a man of ordinary business prudence on his guard, they will find for the defendant, notwithstanding plaintiff may have obtained said notes for value before maturity.

2. Although the jury may believe that a charter was granted by the Legislature of the State of Tennessee by which a corporation was to be (to have been) created to be called the St. Louis, Cairo and Johnsonville Packet Company, such act did not authorize the corporation or stockholders to assemble beyond the limits of the State of Tennessee for the purpose of organizing, electing directors and accepting the said charter; and if the jury believe from the evidence that the first meeting of the stockholders of such corporation was held at St. Louis, in the State of Missouri, then the proceedings of that meeting, and all other meetings outside of the limits of the State of Tennessee, were wholly void and without authority of law, and the jury will find for the defendant Byrne.

3. That unless the jury believe from the evidence that the plaintiff Camp obtained the notes sued upon for value before maturity, and, without notice of the facts set up as a defence by the defendant Byrne, that he took the same subject to the same defence that the defendant Byrne would have had against the St. Louis, Cairo and Johnsonville Packet Company; and if the jury further believe from the evidence that the notes sued upon were obtained in the first place by fraud of any agent or officer of the said company, or that the consideration thereof had failed, or that the same were obtained by false representations of C. J. Caffrey, then the plaintiff cannot recover, and the jury will find for the defendant.

4. Unless the jury believe from the evidence that the St. Louis, Cairo and Johnsonville Packet Company is a corpora-

tion chartered by the State of Tennessee, and that the incorporators and stockholders thereof had accepted said charter, and proceeded, under its provisions, to organize such corporation by the election of directors at a meeting of the stockholders held within the limits of the State of Tennessee, and that, before proceeding to transact business as a corporation, the capital stock to the amount of three hundred and fifty thousand dollars had been subscribed and paid in, then the said St. Louis, Cairo and Johnsonville Packet Company never had any legal existence, could not make a contract with the defendant as a corporation, and could not make a lawful transfer of the notes sued upon to plaintiff so as to enable plaintiff to maintain this action.

5. If the jury believe upon the evidence that the said notes were obtained from the defendant by the said C. J. Caffrey, without giving the said defendant value or a consideration for the same, and that the plaintiff had notice of such fact before he negotiated the notes, they should find for the defendant.

6. If the jury believe upon the evidence that the two notes, the subject-matter of the present action, were among others given to plaintiff with instructions from the company to collect the amount and apply the same in payment of the notes of the said company, they should find for the defendant.

The court gave, at the motion of plaintiff's counsel, the following instructions, which were excepted to by the defendant, to wit:

2. The jury are instructed that the notes sued on are negotiable promissory notes, and that the plaintiff is entitled to recover, if they shall believe that the notes were negotiated with plaintiff before maturity for value, without notice, all of which must be presumed to be the case until the contrary is made to appear by evidence.

4. The jury are instructed that, after the defendant has made his notes (sued on) payable to the order of the St. Louis, Cairo and Johnsonville Packet Company, and deliv-

ered them to the company, he is precluded from afterwards denying that the company has power to negotiate the same.

5. The jury are instructed that, if they believe that the notes sued on were transferred before maturity to plaintiff for value, then he has a right to recover, unless he had notice prior to receiving the same that the consideration had failed, or some notice that the defendant objected to their negotiation.

And, of its own motion, the court gave the following instruction, excepted to by defendant, to wit:

"The jury are instructed that, if they find for plaintiff, and against defendant Byrne, they will assess the damages against both defendants at the amount of said notes, with interest from maturity at the rate of six per cent.; that, if they find for defendant Byrne, they will so state in their verdict, and assess the damages in favor of plaintiff against the St. Louis, Cairo and Johnsonville Packet Company at the amount of said notes, with interest from maturity at the rate of six per cent. per annum."

And, at the motion of defendant's counsel, the court gave the following, modified by the court by the addition of the words "at or prior to the time said notes were transferred to him," to wit:

"If the jury believe from the evidence that the consideration of the notes sued upon has failed, or that the same were obtained by false representations, or that the transfer of the said notes was made by a person having no authority to transfer the same, they will find for defendant; provided, they further believe that plaintiff had notice thereof '*at or prior to the time said notes were transferred to him.*'"

*Slayback & Spencer*, for appellants.

I. Under the act organizing the St. Louis Circuit Court, a motion to strike out or reform a pleading should be determined by the court in general term. It is improper for this court in special term to strike out, on its own motion, the same parts of a pleading previously passed on at general

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term, after the jury had been sworn and the issue joined, without notice to parties.—G. S. 1865, §§ 10 & 11, p. 889, §§ 8, 15, 23, ch. 168, pp. 670–2.

II. A negotiable note or bill of exchange will be void in the hands of an innocent holder when it is founded in fraud, or duress, or imposition, or circumvention, or taking undue advantage of a party.—Sto. on Bills, § 185; Chit. on Bills, pp. 21, 83, 84; Bail. on Bills, p. 143, par. 2, 5 ed.; id. pp. 56, 57, par. 6; Duncan v. Scott, 1 Camp. 100; Rees v. Marquis of Headford, 2 Camp. 574; Grew v. Bevan, 3 Stark. 134; City Bank of Columbus v. Phillips, 22 Mo. 85; 1 Pars. Bills, 276, 277.

III. A contract obtained for a corporation by the fraud of its agent is void; not merely voidable, but void *ab initio*.—Ang. & A. on Corp. § 309, p. 357; Crump v. U. S. Mining Co., 7 Grat. (Va.) 352; Denny v. Kyle, 16 Mo. 450; Scott v. DePyser, 1 Edwds. Chan. 513; Hibernia Turnpike Co. v. Henderson, 8 S. & R. 219.

IV. Any person who deals with a corporation is not excused for ignorance of public acts limiting its corporate powers, and a person who purchases notes given to a corporation as subscriptions to its stock, knowing them to be so given at the time he takes them, is presumed to have notice as to whether such corporation has ever so perfected its corporate existence as to be able to enforce its subscriptions.—Ang. & A. on Corp. § 291–299; Att. Gen. v. Life & Fire Ins. Co., 9 Paige Chan. 470; Valk v. Crandall, 1 Sand. Chan. 179; Williams v. Chester & Holyhead R.R. Co., 5 Eng. L. & E. 503; Wyman v. Hallowell & Augusta Bk., 14 Mass. 58; Salem Bk. v. Gloucester Bk., 17 Mass. 29; Hartford Bk. v. Barry, 17 Mass. 97.

V. In order to acquire such existence as will enable the corporation to enforce its subscriptions, the charter of such corporation must be accepted, and conditions precedent must be complied with, according to the terms of such charter.—Red. on Rail., §§ 15, 51; Ang. & A. on Corp. §§ 83, 95, 112;

232, 229, 239, 253, 291; 2 Kent C. 293 et seq.; *Hibernia Turnpike Co. v. Henderson*, 8 Sarg. & R. 219, 224.

VI. The capital stock is a trust fund for creditors, and must be paid in before the corporation can enforce subscriptions, or acquire such vitality as can enable them to make and enforce contracts where the amount of such capital stock is limited by charter.—*Fire Dept. v. Kip*, 10 Wend. 266; *Ang. & A. on Corp.*, 600; *Wood v. Dummer*, 3 Mason C. C., 308; *Cooper v. Frederick*, 9 Ala. 742; *Bk. of Natchez v. Chambers*, 8 Miss. 49; *State v. LaGrange & M. R.R. Co.*, 9 Humph. (Tenn.) 448; 1 Amer. Law Mag., 103; *Red. Rail.*, §§ 18, 51; *King v. Elliott*, 5 Sm. & Mar. 428.

VII. Unless a corporation be organized within the State granting its charter, all acts, votes and proceedings of stockholders and directors chosen at meetings assembled outside of the limits of such State, and not in conformity to the charter of such corporation, are wholly void, and persons elected at such meetings so held, without regard to their charter, to act as officers of such corporation, derive no authority to act as such corporation.—*Ang. Corp.*, §§ 104, 161, 274, 265, 291, 403, 466 (a), 521, 543, 498, 633; 7 Grat. (Va.) 352; *Green v. Seymour*, 3 Sand. Ch. 285; *Root v. Goddard*, 3 McLean's C. C. 102.

VIII. A corporation organized in Missouri, in order to acquire actual and valid legal existence as a body corporate, must be either chartered by a special act of the Missouri Legislature or formed under the general statutes of the State.—G. S. 1865, ch. 62.

IX. Although corporations created and chartered by the laws of another State may be represented by agents within this State, yet the corporation itself has no power to migrate to this State.—*Miller v. Ewer*, 14 Shep. (Me.) 509; *Bk. of Augusta v. Earle*, 13 Pet. (U. S.) 586; *id.* 122; *Tatum v. Wright*, 3 Zab. 429.

X. A person contracting with a corporation is not thereby precluded from denying the legality and binding effect of its

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subsequent proceedings, unless he participated in such acts.—*Smith v. Heidecker*, 39 Mo. 163, and cases above cited.

XI. The doctrine of estoppel to deny the legal existence of a corporation, by having contracted with it by its name, does not apply, unless such corporation has been actually created by law. In the latter case, a person contracting with such corporation may be estopped from disputing the corporate existence, but may question the authority of its agents to act outside of the powers conferred by such charter, and disputing the authority of an agent is not a denial of the existence of such corporation.—*Oldtown & Lincoln R.R. Co. v. Veazie*, 39 Me. 571.

XII. The general principle that a person who has executed a promissory note payable to a corporation, is not allowed to call in question the corporate capacity of such corporation, does not apply to the maker of a note who has been induced to give his signature to such note by fraud.—*Ang. Corp.* § 309; *Root v. Goddard*, 3 McLean's C. C. 102; *Crump v. U. S. Mining Co.*, 7 Grat. (Va.) 352; *Fairfield Co. Turnpike Co. v. Thorpe*, 13 Conn. 173; *Denny v. Kyle*, 16 Mo. 450.

XIII. The maker of a note payable to a corporation may resist its payment in the hands of an endorsee, to whom such note may have been transferred by persons not legally authorized under its charter to make such transfer.—*Ang. Corp.* § 393; 2 Hare Ch. 461; *Plahto v. Mer. & Man. Ins. Co. of St. Louis*, 38 Mo. 255, and *Head v. Prov. Ins. Co.*, 2 Cranch, 168; *Simon v. Randall*, 3 M. & Craig Ch. 444; *Hodgson v. Copeland*, 4 Shep. (Me.) 314; *Smith v. Hurd, Metc. (Mass.)* 371.

XIV. To make the transfer of a note from a corporation valid, such transfer must be made by a person having authority under the charter and by-laws of the corporation to make such transfer, and persons dealing with a corporation must take notice of the extent of the authority of its agents.—*Ernest v. Nichols*, 30 Law Times, 45; 6 House of Lords Cases, 418, decided in Aug., 1857; *Ridgley v. Kingsbridge*

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Flour Mill Baking Co., 2 Exch. 711; Salem Mill Dam Co. v. Ropes, 6 Pick. 23, affirmed in 9 Pick. 187; Worcester & Nashua R.R. Co. v. Hinds, 8 Cush. (Mass.) 110; Red. Rail., p. 697, note *a.*; Mechanics' Bk. v. Schaumburg et al., 38 Mo. 243.

*Isaac T. Wise*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This cause is brought here upon an appeal from the St. Louis Circuit Court at general term. The suit was instituted upon two negotiable promissory notes, each for the sum of \$250, executed by the appellant Byrne and made payable to the order of the St. Louis, Cairo and Johnsonville Packet Company. They were both dated on the 8th day of December, 1865, one payable ninety days and the other one hundred and twenty days after date. The petition alleges that said company before maturity transferred the same by endorsement to the respondent Camp for value, and that he was then the owner and holder thereof. There was no appearance for the company, and judgment by default was taken against it. The answer of Byrne denies generally the several allegations of the petition, and then proceeds to set up several special grounds of defence: First—that the said notes were given in consideration of his subscription for five shares of stock in the said company at one hundred dollars per share; that he was induced to make the subscription and execute the notes upon the false and fraudulent representations of one C. J. Caffrey. Second—that this company was never a body corporate, but a sham and a fraud concocted by Caffrey with the intent of defrauding and taking advantage of him and many others; that all elections pretended to have been held under a charter for said company passed by the Legislature of the State of Tennessee, as well as all other acts and things done in pursuance thereof, were utterly void and of no effect. Third—that all of the pretended acts of Caffrey as president of the company were

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without authority and therefore not binding upon Byrne, and that Camp had notice of these facts at the time he obtained the notes.

A motion was made by the respondent's counsel to strike out so much of the answer as denied the corporate existence of the company, and alleged fraud in its organization, as well as a failure of consideration for the notes. Under the law regulating practice and proceedings in the St. Louis Circuit Court, it is provided that all motions to strike out or reform pleadings shall be heard and determined at general term. The motion in this instance was so heard and by the court overruled. At the trial of the cause at special term, the judge then presiding, on his own motion, directed a large portion of the answer embraced in the motion to be stricken out; which was done, and exceptions duly taken. The verdict and judgment being for the plaintiff, an appeal was taken to the general term, where the same was affirmed. The action of the judge at special term is assigned for error, and it is insisted upon as sufficient to authorize a reversal of the judgment. We do not think so. It is an irregularity certainly, but not such as to affect the merits of the case. The statute seems to contemplate the settlement of all questions at general term which relate to the form and sufficiency of the pleadings, so that when the causes are distributed for trial at special term the issues are to be considered as made up. The court at general term by affirming the judgment did not seem to regard this departure from the rule of practice fixed by the statute as sufficient to affect the merits of the case, nor do we. The proof presents substantially the following state of facts.

A charter was granted by the General Assembly of the State of Tennessee on the 16th of November, 1865, authorizing the formation of a company to be called the "St. Louis, Cairo and Johnsonville Packet Company." The capital stock was limited to one million of dollars, and the company authorized to organize and proceed to business when the sum of three hundred and fifty thousand dollars should be actu-

ally subscribed and paid in. No organization was effected in the State of Tennessee. The commissioners named in the charter called a meeting for the election of the first board of directors in the city of St. Louis. A board was elected and proceeded to do business under the charter. It is shown by the testimony offered on the part of the defendant Byrne, that, for the purpose of carrying on the business of the company, the chief part of which, as stated by the charter, being the running of a line of boats from the city of St. Louis to Johnsonville, it was necessary to borrow money. The witness Caffrey, after stating that he had negotiated a loan with Camp, the respondent, and that in that transaction he had transferred to him the notes sued upon, says: "I did it as president of the company. I acted under the direction of the board of directors in doing it. They had not been consulted as to this particular transaction further than they had authorized me to negotiate for a loan of money to meet demands upon the company, and gave me authority to use the credit and resources of the company to do it. I met Mr. Camp, and he told me he had some surplus money, and he called at the office of the company and examined the notes for stock which I proposed to give him as collateral security." Other testimony in the cause shows that this transaction occurred in the month of February, 1866, and before the maturity of either one of the notes in controversy. That portion of the answer which was stricken out at the trial set up the defence that the company had no legal existence as a corporation, and stated specifically the reasons in support of that position.

The law seems to be well settled in this country that "all votes and proceedings of persons professing to act in the capacity of corporations, when assembled beyond the bounds of the State granting the charter of the corporation, are wholly void"—Ang. on Corp. § 498, and *Miller v. Ewer*, 27 Me. 509. If the respondent's right to recover in this case depended solely upon the power of this company to contract and do business as a corporation, it would seem to be clear that his

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action must fail. Whether it was assumed by the judge trying the cause that the act of incorporation was conclusive evidence of the fact that the company had a living corporate being, or that the defendant Byrne by his acts was estopped from denying its existence, cannot be accurately determined from the record. It is certainly true that the mere legislative act is not sufficient of itself to give vitality to a corporate body—a creature said to be “intangible” and “which exists merely in contemplation of law.” The acts of the persons designated by the charter, performed in the manner pointed out, could alone clothe the individual subscribers of stock in this company with corporate powers and privileges. The organization of the company, therefore, in the State of Missouri was not a compliance with the provisions of the charter and did not constitute a corporation. But does not the admission of the defendant in his answer, that he executed the notes in question, estop him from denying the existence of the corporation as against an innocent holder? There is no evidence tending to show that Camp had knowledge of any of the facts relied upon in the answer as a defence to the notes. They were transferred before maturity, and the right of the company to make such transfer cannot be disputed by the maker. The notes were executed in the month of December, 1865, and the company continued to do business until the month of June following. There is nothing tending to show that during that time there was any doubt as to the regularity of its organization and its rightful existence as a corporate body. The defendant himself had so recognized it by making the negotiable paper which he did. If he did it with knowledge of the fact that this company, of which he thus became a member, was in point of fact a mere cheat and a fraud upon the public, he should not be permitted to take advantage of his own wrong. Even though he acted in ignorance of the facts in the case, still he had placed it in the power of the company to give currency to his paper, and he alone must suffer the consequences.

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The transferring through its officers of the notes in question, as well as the execution of the company's notes to Camp, were concurrent acts. The money was loaned to the company upon the faith of the notes given for stock. Their solvency was passed upon and a selection made by Camp before the money was actually paid to the company. They were not given as collaterals to secure a pre-existing debt, but constituted the security upon which the loan was really made, and Camp is therefore a *bona fide* holder for value.

With this general view of the case, and applying the law to the facts in the record, it is apparent that the instructions asked by the defendant were properly refused. The court committed no error in excluding all testimony in relation to the amount of stock actually subscribed and paid in previous to the first meeting, and also as to what became of the money loaned by Camp to the company. These, with the kindred subjects of investigation sought to be introduced in the course of the trial, were not legitimate matters of inquiry, and the ruling of the court in relation to them must be sustained. The instructions given on the part of the plaintiff, taken together, declared the law properly in relation to negotiable promissory notes in the hands of a *bona fide* holder for value.

The judgment of the Circuit Court must therefore be affirmed. The other judges concur.

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CHARLES F. BAILEY, Respondent, v. JAMES F. CHAPMAN, Appellant.

1. *Practice—Trials—Evidence.*—The admission of evidence out of its proper order is a matter within the sound discretion of the court trying the cause.
2. *Contract—Sale—Broker—Services.*—A broker employed to make a sale under an agreement for a commission is entitled to payment when he makes the sale in good faith according to instructions, and the principal cannot relieve himself from his liability by refusing to consummate the sale, or by any voluntary act of his own disabling him from performance.

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Bailey v. Chapman.

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*Appeal from St. Louis Circuit Court.*

Plaintiff's instruction given :

"If the jury believe from the evidence that the defendant employed the plaintiff to sell the real estate described in the petition for one hundred dollars per foot, one third cash, one third in one year, and one third in two years; that the said plaintiff undertook to sell said property for said price and upon said terms; that said plaintiff procured a purchaser for said lot at said price and upon said terms, and reported the same to said defendant; that said defendant had, after said employment and before said plaintiff reported said sale to said defendant, sold said lot without notifying said plaintiff of said sale, and that said defendant refused to ratify said sale made by said plaintiff, then the jury will find for the plaintiff in such sum as his services were worth, unless the jury further find that plaintiff was expressly requested not to make a sale without first informing the defendant, and that he failed so to do."

The defendant's instruction is as follows :

"If the jury believe from the evidence that Charles F. Bailey was instructed to see James F. Chapman before making sale and failed to do so, and if they believe that Mr. Kaime, or any other agent, was authorized to sell, and that Chapman actually sold the property described in the deed offered in evidence on the 6th of June, 1866, at least one week before Bailey claims to have sold the same property, then said Bailey cannot recover."

*Wm. S. Pope*, for appellant.

*Ewing & Holliday*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The objection that the court permitted the plaintiff to be recalled and re-examined could not have operated to the serious detriment of the defendant, and no advantage can be

The transferring through its officers of the notes in question, as well as the execution of the company's notes to Camp, were concurrent acts. The money was loaned to the company upon the faith of the notes given for stock. Their solvency was passed upon and a selection made by Camp before the money was actually paid to the company. They were not given as collaterals to secure a pre-existing debt, but constituted the security upon which the loan was really made, and Camp is therefore a *bona fide* holder for value.

With this general view of the case, and applying the law to the facts in the record, it is apparent that the instructions asked by the defendant were properly refused. The court committed no error in excluding all testimony in relation to the amount of stock actually subscribed and paid in previous to the first meeting, and also as to what became of the money loaned by Camp to the company. These, with the kindred subjects of investigation sought to be introduced in the course of the trial, were not legitimate matters of inquiry, and the ruling of the court in relation to them must be sustained. The instructions given on the part of the plaintiff, taken together, declared the law properly in relation to negotiable promissory notes in the hands of a *bona fide* holder for value.

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Bailey v. Chapman.

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"If the jury believe from the evidence that the defendant employed the plaintiff to sell the real estate described in the petition for one hundred dollars per foot, one third cash, one third in one year, and one third in two years; that the said plaintiff undertook to sell said property for said price and upon said terms; that said plaintiff procured a purchaser for said lot at said price and upon said terms, and reported the same to said defendant; that said defendant had, after said employment and before said plaintiff reported said sale to said defendant, sold said lot without notifying said plaintiff of said sale, and that said defendant refused to ratify said sale made by said plaintiff, then the jury will find for the plaintiff in such sum as his services were worth, unless the jury further find that plaintiff was expressly requested not to make a sale without first informing the defendant, and that he failed so to do."

The defendant's instruction is as follows :

"If the jury believe from the evidence that Charles F. Bailey was instructed to see James F. Chapman before making sale and failed to do so, and if they believe that Mr. Kaime, or any other agent, was authorized to sell, and that Chapman actually sold the property described in the deed offered in evidence on the 6th of June, 1866, at least one week before Bailey claims to have sold the same property, then said Bailey cannot recover."

*Wm. S. Pope*, for appellant.

*Ewing & Holliday*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The objection that the court permitted the plaintiff to be recalled and re-examined could not have operated to the serious detriment of the defendant, and no advantage can be

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taken of it on error, as it was a matter resting in the sound discretion of the court. No exceptions were taken to the instructions; but we have examined them and think they are wholly unobjectionable, and correctly expound the law as applicable to the case made by the pleadings and evidence. The testimony was conflicting, but it was for the jury to weigh and attach to it whatever importance they deemed it deserved.

A broker employed to make a sale under an agreement for a commission is entitled to pay when he makes the sale according to instructions and in good faith, and the principal cannot relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own disabling him from performance—*Wentworth v. Luther*, 21 Barb. 145; *Kock v. Emmerling*, 22 How. (U. S.) 69; *Moses v. Burling*, 31 N. Y. 462.

The verdict of the jury entirely negatives the defence made by the defendant, that the plaintiff was to communicate with him before closing any contract of sale.

Judgment affirmed. The other judges concur.

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ELISE LOOS, by CECILE LOOS her Guardian, Appellant, v.  
THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,  
Respondent.

*Insurance—Policy on Life—Representatives—Administration.*—In a policy of life insurance, providing that in case of death the sum insured shall be paid to the "heirs or representatives" of the party assured, the money will be payable to the heirs or next of kin, if it appear from the context that the object of the assured was to make provision for his family, and not that the money should go to his executors or administrators to be administered as ordinary assets of his estate.

*Appeal from St. Louis Circuit Court.*

J. A. Beal, for appellant.

The policy does not provide for the money to be paid to Loos' executors, administrators, or assigns. The usual words

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used in policies are these particular ones, where the sum insured goes to the estate on death of the assured.—See forms adopted by insurance companies when the administrators take the insurance; Ang. on Ins. §§ 247, 277; Wayman v. Wayman, 12 Smith, (N. Y.) 253; 3 Kent, 439.

The word "heir" is taken to be the person who will by law of the State inherit—1 N. J. 347.

Where a policy was effected by a party for the benefit of his widow, and it was simply charged in the suit to be for her benefit without in so many words specifying in the policy to be for her benefit, the widow is the party to sue even though there is an executor—Meyers v. Keystone Life Ins. Co., 27 Penn. 268.

Upon the happening of a certain contingency such as death, the sum expressed to be payable to heirs is due to them and not to an administrator—3 Kent, 482; 28 Eng. L. & Eq. 312.

Kent says that a person may insure his life for the benefit of another in which he is interested, but in that case the policy must be assigned. In the case of insurance for heirs, it is not necessary to assign the policy to his heirs, as on his death it naturally goes to them—3 Kent, 482.

Wayman v. Wayman, 12 E. D. Smith, 253, the words in a policy were "pay to his executors, administrators and assigns"; in the case of Loos, before the court, the words are "heirs or representatives."

Courts often construe the word "representative" to mean heirs or consanguinity—2 Wm's Ex'rs, 973. See statutes for heirs, &c., construed; 3 Bro. C. C. 224-5; 2 Wm's Ex'rs, 950-1.

A testator directed the residue of his personal estate after the death of his widow to go to and be distributed to his legal representatives. Held to mean his next of kin according to the statute of distributions. So in Loos' case the word "representatives" in connection with "heirs" means next of kin—Booth v. Vicars, 1 Cool. 7; King v. Powell, 2 Cool. 262; 3 Vesey, 146; 2 Wm's Ex'rs, 933, 970-2; see pp. 12 & 13 to App. Ang. Life Ins.

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If it appear that a covenant was made for the benefit of a party, he can sue in his own name. It is not necessary that his name should be used in express terms; he may be pointed out and designated in the instrument by the name of heirs—*Chaplin v. Canada*, 8 Conn. 286; *Fellows v. Gilman*, 4 Wend. 414, 419.

*Harding & Crane*, for respondent.

The respondent claims that under the facts the appellant could not sue; that the demand against the respondent is a chose in action, which can be collected only by the executor or administrator of Louis Loos; that when so collected the fund will become assets in the hands of such executor or administrator, subject to debts of the deceased; and that payment by respondent to appellant would not discharge it from liability to the executor or administrator—*Wms.' Ex'rs*, 1st ed., 508-9, or p. 664 of 3d ed.

It is not contended that Louis Loos might not have insured his life for the benefit of his child, or of his wife, or other persons having an insurable interest, exclusive of any claims by his executors or administrators; but it is contended that he did not do so in this instance. See act of March 19, 1866 (*Sess. Acts 1865-6*, p. 59, § 43, incorporated in *G. S. 1865*, p. 362, § 43), as to who has an insurable interest outside of creditors, &c.

Louis Loos insured for his own benefit. If he had lived fifteen years from the date of the policy, he could have collected the sum insured on himself, or after the delivery of the policy he could have assigned it to whom he pleased.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff on a policy of insurance.

It seems from the petition that Louis Loos had his life insured in the office of the defendant, by a policy dated April 4, 1866, in the sum of five thousand dollars, for the term of fifteen years. It was provided by the policy that the sum in

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sured should be payable to said Loos, if he should be living at the expiration of the said term of fifteen years, or, in case of his prior decease, "to his heirs or representatives." Loos died September 16, 1866, and his daughter Eliza brings this suit, as sole heir, to recover the amount of the policy. A demurrer was filed and sustained to the petition, because the plaintiff had no right to sue.

Whether the action accrued to the plaintiff, or should properly have been brought by the executor or administrator of Loos, must depend upon the meaning to be affixed to the word "representatives." Legal representatives and personal representatives, in the general or professional sense, mean simply executors or administrators. Although this is the primary, legal meaning, they are often construed differently, if it is clear that the intention was to vest the estate in a different class of persons. That they mean executors and administrators will ordinarily be taken as true, where nothing is shown to raise a counter presumption, but the meaning is not so inflexibly attached as to prevail in all cases when it is manifest that another disposition was intended. The intention must control, and that intention is to be gathered by a view of the context subject-matter and the purpose to be attained. The words have therefore been held to mean next of kin when the circumstances of the case made it apparent that such a construction would effectuate the object had in view. The language used by the assured would seem to indicate that it was his intention, in case of his untimely decease, to make some provision for the surviving members of his family, and not that the money arising from the policy should go to his executors or administrators, to be administered on as ordinary assets.

Policies for a term of life insurance of this description are of frequent occurrence, and where it is meant that the money resulting from the policy shall descend and be used as common assets, the invariable language is "to pay to the said assured, his executors, administrators or assigns." The changing of the language and using terms of different expression clearly

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import that the money was intended for the benefit of his heirs, or next of kin, and that it was not to be administered on as assets by the executor, or administrator. The plaintiff is the only child and sole heir, and she is entitled to the money; the word "representatives," used in the policy in conjunction with heirs, cannot divest her title or divert the money to another source.

Reversed and remanded. The other judges concur.

ANN DOWNING, Plaintiff in Error, v. GEORGE DEIS and WILLIAM BADER, Defendants in Error.

*Lands and Land Titles—Confirmation—Old Board—Enurement—Conveyances.—*

Under a confirmation made by the old Board of Commissioners, the title passes to the person presenting the claim and to whom the certificate issues, and does not enure to the benefit of an assignee under an assignment made prior to the filing of the claim.

*Error to St. Louis Circuit Court.*

The plaintiff, to sustain the issues upon her part, gave in evidence—

1. A certificate of confirmation by the old Board of Commissioners, dated January 10, 1809, issued to Thomas Johnson, upon a grant to John Scott by Lt. Gov. Zenon Trudeau, dated March 20, 1797; claim filed by Thomas Johnson, January 25, 1806.

2. Copy of U. S. survey No. 120, for 432 arpents, surveyed by Jos. C. Brown in 1818.

3. A deed of exchange made between Thomas Johnson and Alex. McDaniel, dated October 16, 1802, in which Johnson purported to convey 200 arpents in the northern part of the land conveyed to him by John Scott. This deed was not recorded until July 17, 1847.

4. A decree in case of Jona. Wiseman's Adm'r et als. and heirs of Davidson v. Alex. McDaniel's Ex'r, rendered July 26, 1827, upon a bond given by said McDaniel, conditioned

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for the conveyance of said 200 arpents to Daniel Davidson of Harrison county, Va., directing that the executor of McDaniel should execute to the heirs of said Davidson a deed for the premises.

5. A deed by said executor made in pursuance of such decree, dated July 28, 1827, to Josiah H., Ann, Edith, and Rowena Davidson, and Cassandra, wife of Walter Kinkead, children and heirs of Daniel Davidson, deceased.

6. Josiah H., Cassandra and Walter Kinkead made a deed for the premises to Samuel Downing, dated June 22, 1832; the deed was acknowledged before a justice of the peace. Edith and Rowena with their husbands made a deed for their interest, dated October 8, 1836, to Samuel Downing; this deed was acknowledged before a justice of the peace for St. Louis county.

7. Partition proceedings among the heirs of Samuel Downing, with the report of sale, made by the sheriff under the judgment in partition, of the premises sued for, to John H. Downing. No deed was produced, but the record of the court showed that the sheriff had acknowledged in open court a deed conveying the premises as stated in his report.

8. Deed dated April 14, 1854, from John H. Downing to Rufus Case.

9. Deed of Rufus Case to Ann Downing's trustee, John H. Downing, to secure a debt, dated April 14, 1854. Under this deed, the sheriff of St. Louis county, acting as trustee under order of the court, sold and conveyed the premises to Ann Downing by deed dated March 27, 1863.

The plaintiff then offered testimony tending to show that some of the parties under whom she claimed had been in possession of the premises sued for.

*E. A. Lewis*, for plaintiff in error.

I. The instruction given by the court was erroneous. It usurped the whole province of the jury—*Chambers v. McGivern*, 33 Mo. 202.

II. The plaintiff had made out a complete chain of title

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from the United States Government. But even if any defects were discoverable in the earlier muniments of title, a complete *prima facie* case had been made out by plaintiff under the statute of limitations by actual seizin in her grantors—Schultz v. Arnot, 33 Mo. 172; Ang. Lim. 398, 431.

*Bakewell & Farish*, for defendants in error.

The plaintiff showed no legal title to the land in controversy.

I. By the confirmation to Thomas Johnson the legal title to the land vested in him. The prior conveyance to McDaniel did not cause the legal title acquired under the confirmation to enure to him; he merely become the beneficiary owner and entitled to a conveyance—Landes v. Perkins, 12 Mo. 254; Norcum v. Gaty, 19 Mo. 69; Guyol v. Chouteau, 19 Mo. 546; Leitensdorfer v. Goebel, 31 Mo. 475.

Fagg, Judge, delivered the opinion of the court.

The plaintiff brought an action of ejectment in the St. Louis Circuit Court to recover possession of a certain tract of land described in the petition. The cause was tried by the court sitting as a jury, and at the conclusion of the plaintiff's case the following instruction was given at the instance of defendant's counsel, viz.: "The plaintiff is not entitled to recover upon the case made by her." A non-suit was taken with leave to the plaintiff to move to set it aside. That motion being overruled, the case is brought here upon a writ of error.

The only question in the case is the correctness of the instruction. The testimony has been carefully examined with the view of ascertaining whether there is any foundation whatever for the plaintiff's claim to rest upon. It cannot be contended for a moment that any legal title was shown in the plaintiff, and nothing to sustain the counsel's point in regard to possession.

The judgment of the court below must be affirmed. The other judges concur.

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State ex rel. Adamson v. Lafayette Co. Ct.

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THE STATE OF MISSOURI *ex rel.* THOMAS ADAMSON, Plaintiff,  
v. THE COUNTY COURT OF LAFAYETTE COUNTY, Defendant.

1. *Sheriff—Collector—Officer—County Court.*—None of the acts required by the statutes to be performed by a party in order to qualify him to exercise the functions of the office of sheriff, depend upon the approval of the County Court. It is immaterial as far as the right of the sheriff elect to exercise the duties of his office is concerned, whether his bond be approved by the Circuit Court within fifteen days after he receives the certificate of election or not; the time is immaterial if the bond be properly approved—State ex rel., &c. v. Churchill, *ante* 41; State ex rel., &c. v. Howard Co. Ct., *ante* 247. The County Court, when the sheriff elect presents his bond as collector of the revenue, cannot inquire whether his bond as sheriff has been approved by the Circuit Court; it must recognize his commission issued by the Governor as conclusive of his right to the office.
2. *County Court—Jurisdiction—Duties Ministerial and Judicial.*—The duties of the County Court, in passing upon the bond of the sheriff as collector of the revenue, are partly judicial and partly ministerial in their nature. The court has a discretion as to the sufficiency of the bond offered for their approval, which must be exercised in a lawful manner upon the facts presented, and the Supreme Court will exercise a superintending control over that discretion, so far as to compel the County Court to proceed according to a sound and just discretion, and to prevent the exercise of it in an unjust and arbitrary manner. To refuse to hear any testimony, or to pass upon the sufficiency of the securities offered, is not exercising a sound and legal discretion.—State ex rel. v. Lafayette Co. Ct., *ante* 221.
3. *Mandamus—Practice—Return.*—The issues should be made up on the return to the alternative writ; and for the purpose of reaching the legal questions involved, it will be assumed, in the Supreme Court, that the necessary steps in pleading have been taken, whenever it is apparent from the facts presented that such questions properly arise.
4. *Revenue—Collector's Bond—County Court.*—The County Court is not prohibited by the statute from requiring of the collector of the revenue, at any time when the public interest demands, additional bond and security, allowing him reasonable time to comply with the order of the court; and if reasonable time be not given, and no good cause be shown to the contrary, the presumption will be that the court has acted in an arbitrary and unjust manner. A copy from the assessment books showing the several amounts at which the securities in the collector's bond are assessed, will not be conclusive upon the amount of property owned by any individual.

*Petition for Mandamus.*

The petition of Thomas Adamson, the plaintiff, respectfully represents, that at a general election held in the county of

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Lafayette, in the State of Missouri, on the 6th day of November, A. D. 1866, he was regularly and legally elected and chosen sheriff of the said county of Lafayette, having received a majority of all the legal votes cast for candidates for that office; that a certificate of election was issued to him, and that afterwards, to-wit, on the 3d day of January, 1867, the Governor of said State issued and delivered to him a commission, dated the day and year last aforesaid, under the great seal of the State, with the attestation of the Secretary of State, whereby plaintiff was commissioned sheriff within and for the county aforesaid for the term of two years.

Plaintiff further states that in due time before his said election he took, subscribed and filed his oath of loyalty as required by law, and after his election, upon the receipt of said commission, took, subscribed and endorsed on said commission the oath of office prescribed by law, and filed in the clerk's office of said County Court, the same not then being in session, a good and sufficient bond with sureties as *ex officio* collector of said county, which said bond was approved by the justices who then composed said County Court and by the clerk thereof in vacation.

Plaintiff further states, that, since the receipt of said commission and approval of his bond as aforesaid, he acted as and discharged the duties of sheriff and collector of said county until about July 9, 1867, as hereinafter set out.

Plaintiff further states, that at a term of said County Court, which was then and is now composed of Jesse Schofield, N. W. Sitton, and William L. Thomas, justices thereof, begun and held within and for the county aforesaid on the 6th day of May, A. D. 1867, and on the 14th day of said term, being the 24th day of May, 1867, the following proceedings were had and order made by said court, to-wit:

"Whereas, it appears to the court here that the State and county revenue of Lafayette county for the year 1867 will amount to the sum of about eighty-five thousand dollars, and it further appearing to the court here that Thomas Adamson, who now assumes to act as sheriff of the said county

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of Lafayette by virtue of a commission issued by the Governor of the State of Missouri, has failed to execute a bond as collector of the revenue as by law the sheriff is required to do, it is by the court ordered that said Thomas Adamson be notified that he is required to execute a bond as collector of the revenue of said county in the penal sum of one hundred and seventy thousand dollars, with good and sufficient security, conditioned as the law requires; and that he be required to exhibit and produce such bond to this court for its action thereon within ten days after he shall be served with a copy of this order. And it is further ordered that a copy of this order be served on the said Thomas Adamson forthwith, and that a copy of the adjourning order of this court, when made, be also served upon said Thomas Adamson immediately after the adjournment of said court."

Plaintiff further states that on the 25th day of May, 1867, said court adjourned to the 3d day of June, 1867, and that copies of the foregoing order and of the order of adjournment were served upon him.

Plaintiff further states that on said 3d day of June, A. D. 1867, he appeared before said court, then in open session, and produced, exhibited and offered for approval his bond as collector of the revenue aforesaid, with good and sufficient sureties in the penal sum of one hundred and seventy thousand dollars, and conditioned as required by law, which said bond plaintiff now exhibits to this honorable court.

Plaintiff further states, that, anticipating unfair and unjust action on the part of said court, the judges whereof are personally and politically hostile to him, he took extraordinary pains in procuring sureties. He alleges that thirty-five well known and responsible citizens of Lafayette county, who are owners of real estate situate therein, became his sureties in said bond, and as such executed the same, he having first executed it as principal; and he further alleges and offers to prove to this honorable court, that the said sureties are owners of real estate in said county of the value of at least three hundred thousand dollars, subject to execution, over

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and above their debts and liabilities. He avers also that this fact was and is well known to the justices of said County Court.

But plaintiff further states, that, notwithstanding the premises, the said court, actuated by malice and by a determination to deprive him of his said office through a corrupt, arbitrary and illegal use of the forms of law, rejected and refused to accept said bond, and also refused to allow plaintiff to prove the sufficiency and responsibility of his sureties.

The plaintiff further states that on the 6th day of June, A. D. 1867, said County Court, in order to carry out its malicious, arbitrary, corrupt and illegal intention and determination, made and adopted an order as follows, viz.: "It appearing to the court that Thomas Adamson has failed to execute bond as collector as required by law, and it further appearing that the time fixed by the statute for the execution of such bond has expired, and that more than ten days has elapsed since said Adamson has been notified and required by the court to execute said bond conditioned according to law, and said Adamson having failed to execute his bond as collector, said office has become and is in law vacant, and the court finds that the office of sheriff and collector for the county of Lafayette is by operation of law vacant in consequence of said Thomas Adamson failing to execute his bond as collector of said county within the time and in the manner required by the statute in such cases made and provided; and it is further ordered that the coroner of said county be notified of said vacancy, and required to act as sheriff until such vacancy is filled."

The plaintiff alleges that the recitals and statements in said order, that he had failed to execute the bond required, are false and untrue, and that they were so known to be by said court; that said court made said recitals and statements with the corrupt intent to deprive the plaintiff of his said office in defiance of law and justice, and of the expressed will of the majority of the legal voters of Lafayette county; that he executed and tendered to said court a good and suffi-

cient bond conditioned according to law with ample security for his performance thereof as aforesaid, and that the action of said court respecting the same was not the exercise of the discretion lawfully pertaining to its judicial functions, but was the corrupt, arbitrary and illegal action of the justices thereof, sitting as a court and using its forms to oppress, and unjustly and illegally deprive plaintiff of his said office.

The plaintiff further states, that, to carry out the malicious, oppressive and illegal designs and determinations as aforesaid, said County Court ordered a special election to be held in Lafayette county on the 9th day of July, 1867, to elect and choose a sheriff for said county of Lafayette, and on said 9th day of July, 1867, caused poll-books to be opened at the different voting precincts in said county, at which divers persons cast votes for a sheriff for said county as if there had been a vacancy in said office, and as if said election had been lawfully ordered; whereas, in fact, the plaintiff alleges that he was then and still is of right the sheriff of said county of Lafayette, that there was no vacancy in said office, and that said election was fraudulent, null and void.

Plaintiff further states that after said pretended election was held, the said justices of said County Court ordered the clerk thereof to issue a certificate of election to one James M. Poule, certifying that he had been duly elected sheriff of said county, which said certificate was false and was known so to be by said justices, and was by them so ordered to be issued for the purpose and with the intent of oppressing the plaintiff as aforesaid.

The plaintiff further states, that the Governor of the State refused to recognize said certificate of election and refused to issue a commission thereupon to said James M. Poule; that upon said refusal said justices illegally ordered the coroner of said county to perform and discharge the duties of sheriff thereof, and that he obeyed said order, and is now wrongfully usurping the said office of sheriff and preventing the plaintiff from exercising the functions thereof.

The plaintiff further states that he is remediless in the

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premises by or through ordinary process or proceedings at law, and he therefore prays this honorable court to award against said County Court a writ of *mandamus* commanding and requiring it to accept and approve said bond, and to vacate and annul all of the orders aforesaid, and to recognize the plaintiff as the lawful sheriff of said county; and for such other process, orders, and remedies, as may to the court seem meet.

*Demurrer to Petition and writ.*

For answer and return to said writ the defendant demurs to the petition and writ of the plaintiff in the above case, and assigns the following causes of demurrer, to-wit:

1. Said petition and the matters and things therein as stated and set forth are not sufficient in law or equity to entitle the plaintiff to the relief asked for in said petition, or to authorize the issuing of said writ of *mandamus*.
2. Said petition does not state or show that the plaintiff ever executed bond to the satisfaction of the County Court, within the time prescribed by the statute in such cases made and provided, in the sum of double the amount of revenue to be collected by him; nor does said petition show or state that the plaintiff ever at any time prior to the issuing of the writ in this case, and after the time of his alleged election to said office of sheriff of Lafayette, filed in or tendered to the County Court of said county a bond in double the amount of the revenue to be collected by him, for their acceptance with good and sufficient securities, as it was his duty, under the provisions of the statute in such cases provided, to do; nor does he state or show that the bond rejected by the County Court was a good and sufficient statutory bond.
3. Said petition does not state that the bond tendered by the plaintiff and rejected by the defendant was a bond for at least double the amount of all the revenue to be collected by the plaintiff, or such a bond as it was the duty of the defendant in the discharge of their duties as a County Court

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to accept and approve, or such a bond as the law requires and makes it their duty to approve.

4. Said petition does not state or show that the bond which the plaintiff asks this court to grant a peremptory mandamus to approve, was or is such a bond as the statute in such cases provided requires said plaintiff to tender to said court, to-wit, a bond in at least double the amount of all the revenue of said county to be collected by the plaintiff.

5. Said petition asks this court to review and vacate certain orders of the County Court of said county of Lafayette finding that the office of sheriff of said county was vacant, and calling a special election to fill said vacancy, and notifying the coroner of said county of said vacancy, and requiring him to discharge the duties of said office until said vacancy was filled, and also the order rejecting the bond tendered by the plaintiff; but said petition does not allege or state that plaintiff ever made any motion in said County Court to vacate said orders or any of them, or that said defendant has ever refused to vacate the same or to entertain any motion for their vacation, or that the said defendant has ever in any manner been solicited or moved to set aside or vacate the same.

6. Said petition does not show that plaintiff has exhausted or availed himself of all legal remedies (other than mandamus) to secure the vacation of said orders complained of in his petition, and the approval of his said bond, or that he is otherwise without any adequate legal remedy.

7. Said petition is multifarious, contradictory, inconsistent, and uncertain.

8. Said petition does not show that the said plaintiff has ever executed any bond as sheriff of said county as required by the statute, and which is a condition precedent to his right to exercise the functions and duties of collector of said county of Lafayette.

*Ewing & Holliday*, for respondent.

I. The petition and writ show no sufficient grounds for the

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relief asked for, or for a peremptory mandamus upon the respondent—G. S. 1865, p. 112, §§ 1 to 7; id. 156; State ex rel. Jackson v. Howard Co. Ct., decided at St. Joseph, not reported; People ex rel. Dougherty v. Judges Dutchess C. P. C., 20 Wend. 658-60; People v. Baker, 35 Barb. 109; Judges Com. Pleas v. People ex rel. Savage, 18 Wend. 79; People v. County Judges Clinton Co., 13 How. Pr. 277; Elkins v. Athearn, 2 Denio, 191.

II. The party applying for the writ must not only show that he has no other remedy, but also a specific right to the office by showing that he has done every act on his part required to be done—39 Mo. 388.

Attorney-General and *Harding & Crage*, for plaintiff.

FAGG, J.—It appears from the petition of plaintiff, that at an election in and for the county of Lafayette, held on the 6th day of November, 1866, he received a majority of all the legal votes cast at said election for the office of sheriff of said county; that he received a certificate of his election, and on the third day of January next thereafter the Governor of the State issued and delivered to him a commission as sheriff in conformity with the requirements of law; that previous to the election he took and subscribed the oath of loyalty, and, after the receipt of his commission, the required oath of office; that he thereupon executed his bond as *ex officio* collector of the revenue for that county, which was filed in the office of the clerk of the County Court (the court itself not then being in session) and approved by the justices thereof; that he thereupon proceeded to act as sheriff and collector of said county until the month of July following, when his office was declared vacant by the County Court. It appears that previous to the making of this order on the 24th day of May, 1867, the court made an order reciting the fact that plaintiff was then assuming to act as sheriff under his said commission; that the revenue of the county amounted to about the sum of \$85,000; that plaintiff had “failed to execute a bond as collector of the revenue as by law the sheriff

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is required to do," and ordering him to execute such bond in the penal sum of \$170,000, with good and sufficient securities, within ten days thereafter. Within the time limited by the order the plaintiff appeared and presented to the court a bond in the sum required, with thirty-five good and responsible sureties, and asked to have the same approved. The petition further states, that, "notwithstanding the premises, the said County Court, actuated by malice, and by a determination to deprive him of his said office through a corrupt, arbitrary and illegal use of the forms of law, *rejected and refused to accept said bond, and also refused to allow plaintiff to prove the sufficiency and responsibility of his sureties.*" The court then declared the office vacant, and ordered a special election to be held for the purpose of filling said vacancy. A writ of mandamus is prayed for requiring and commanding said court to accept and approve plaintiff's bond, to vacate and annul all of its orders in reference to said office made subsequent to its refusal to accept and approve his bond as aforesaid, and to recognize the plaintiff as the lawful sheriff of said county. ●

To this petition a demurrer has been filed, and the facts stated by plaintiff are to be taken as true for all the purposes of this investigation.

Passing over the general causes of demurrer assigned by the defendant, we shall proceed to examine only those that are special. First, it is averred that the petition fails to show that the plaintiff did within the time prescribed by law execute a bond to the satisfaction of the County Court in a penal sum double the amount of the revenue to be collected, or such a bond as the law required the court to approve; second, that it is not shown that the necessary steps had been taken to have the orders of the County Court vacated and annulled; and third, that the execution and approval of plaintiff's bond as sheriff is a condition precedent to his right to exercise the functions and duties of collector, and there is no averment in the petition that such bond had been given and approved.

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The last objection to the petition will be first considered. It is conceded that the office of collector is made by the statute an incident to the office of sheriff. None of the acts required by the statute to be performed by a party in order to qualify him to exercise the functions of the office of sheriff are made to depend upon the approval of the County Court. It is required that the bond of the sheriff shall be executed within fifteen days after he receives his certificate of election—G. S. 1865, ch. 25, § 3. This bond has to be approved by the Circuit Court, and it is wholly immaterial as far as the right of the plaintiff to exercise the duties of the office is concerned, whether such a bond had been given within the time prescribed or not. It has been held in at least two cases recently determined by this court, that "the matter of time is not essential to the validity of the bond nor a condition precedent to the party's title to the office"—State ex rel. Att'y Gen. v. C. B. Churchill, *ante* 41, and State ex rel. Att'y Gen. v. Howard Co. Ct., *ante* 247. In any event it is a matter into which the County Court was not required to look before passing upon the plaintiff's bond as collector. It was bound to recognize the commission issued by the Governor as conclusive to the plaintiff's right to the office of sheriff, and could not go behind it for the purpose of ascertaining whether all things required of him, and over which that court had no official control, had been performed or not. (See authorities above cited.) Indeed the order made by the court on the 24th of May is based upon the idea that the plaintiff was then acting as sheriff of the county under the commission of the Governor, and he is required within ten days to execute a bond as collector of the revenue, having failed to execute such a bond (in the language of the order) "as by law the sheriff is required to do." This would seem to be a sufficient admission on the part of the court, not only that plaintiff was then acting as sheriff, but that he was doing so rightfully.

Next we proceed to notice the objection to the petition as stated in the demurrer, that it does not show that plaintiff

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executed a bond to the satisfaction of the County Court and within the time prescribed by the statute. The averment in the petition is that a bond was executed by the plaintiff as collector so soon as he received his commission as sheriff; that the same was approved by the justices then composing the County Court. He continued to discharge the duties of both offices until notified by order of the new court that he must file another bond. The further allegation is that he complied with the requirements of this order by tendering a bond which he charges was arbitrarily rejected and refused, with the malicious design and determination on the part of the justices then composing the court to deprive him of his office. What has heretofore been said in reference to the matter of time, so far as his bond as sheriff was concerned, is equally applicable to the giving of bond as collector. This objection necessarily raises the question as to the extent of the discretion of the court in such cases. In the case of *Adamson v. The County Court of Lafayette Co.*, decided at the last July term of this court at Jefferson City (*ante* 221), and also in the application for a mandamus against the Howard County Court, determined at the August term at St. Joseph (*ante* 247), this discretion was stated in terms sufficiently explicit. The language of the opinion upon that point in the case last referred to was that "the duties of the County Court in this respect are partly judicial and partly ministerial in their nature; that the County Court has a discretion as to the sufficiency of the bonds offered for their approval, which must be exercised in a lawful manner upon the facts presented, and that this court will exercise a superintending control over that discretion so far as to compel the court to proceed according to a sound and just discretion, and to prevent the exercise of it in an unjust and arbitrary manner." It is to be noted that the amount of the penalty of the bond had been fixed by the County Court itself. The averment stands confessed for the purposes of this examination that the court refused to hear any testimony or to pass upon the sufficiency of the security offered. How, then, can it be said

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that the petition does not show that a bond had been executed to the satisfaction of the court? The very ground of the complaint in the petition is that the County Court justices refused to consider the matter at all; that no opportunity was afforded the plaintiff to show the fact of the sufficiency of the security offered, and that the bond was of such a character as the County Court in the exercise of a sound and just discretion would have been compelled to approve. We think the averments in the petition as to the character of the bond are amply sufficient, and the facts admitted by the pleadings show most conclusively that the discretion of the court was not exercised in a proper manner.

In relation to the orders of the County Court which the plaintiff asks may be vacated and annulled, it may be said, briefly, that we shall not interfere with them. It is not necessary that it should be done. The conclusion necessarily follows that if the plaintiff did show his right to the office of sheriff, the order of the court vacating it as well as all of the subsequent orders in relation to the same subject-matter were made without authority of law and must therefore be held to be mere nullities—State ex rel. Att'y Gen. v. Churchill, before cited.

The demurrer will therefore be overruled, and it is ordered that a peremptory writ of mandamus be issued from this court, commanding and requiring the justices composing the County Court of Lafayette county to accept and approve the bond tendered to said court by the plaintiff as collector of the revenue in said county. The other judges concur.

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*Motion for leave to file return to Writ of Mandamus.*

*Ewing & Holliday*, for respondent.

The respondent moves the court for leave to file return to the alternative mandamus in this case, traversing the allegation of said writ, for the following reasons:

First—the attorneys were misled in this, that relying on

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the rule established in same case when pending in this court at Jefferson City, when the court permitted defendant to file a return traversing the allegations of the writ, after overruling a demurrer to the same, and believing that such was the rule of pleading prevailing in this court on that subject, defendant filed the demurrer in this case to raise and determine questions of law arising on the face of said alternative writ under the belief that, should said demurrer be overruled, the defendant could then make return traversing the allegations of said writ and setting up any new matter that would be a bar to the same; and at the time of filing said demurrer stated that a return was ready and would be filed if said demurrer was overruled. And had defendant have known or the court intimated that no return could be made after the overruling of said demurrer, defendant would have filed his return as the first pleading in said case; but believing and relying on the same rule and privilege that was awarded in the case at Jefferson City, he filed said demurrer, and defendant states that he has a good and meritorious defence to said writ upon the facts of the case, for a statement of which he refers to the return which he has prepared, which is here referred to and made an exhibit of this motion, marked "A," and which said return respondent asks leave to file for the reasons aforesaid.

The defendant, for further reason, states that under the first section of the Rev. Stat. of 1866, tit. Mandamus, p. 632, he has a right to make his return to said alternative writ. Said section is in the words following: "When any writ of mandamus shall be issued out of any court in this State, or by any judge thereof in vacation, directed and delivered to any person who by law is required to make return to such writ, such person shall make his return to the first writ of mandamus." Section 2 provides—"When any writ of mandamus shall be issued, and return shall be made there-to, the person suing or prosecuting said writ shall plead or traverse all or any of the material facts contained in such return." Section 3 provides "that the person making such

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return shall reply, take issue, or demur to the pleading of the party suing or prosecuting said writ. It is apparent by these sections that the only pleading contemplated by the statute to the first writ is a return, and a demurrer can only be entertained by consent to settle legal questions, and it does not preclude or take away the right of defendant to make his return under the foregoing provisions of the statute.

For further reason, defendant states that in the case at Jefferson City, being informed by counsel that the first pleading was a return, defendant filed a return, which was afterwards withdrawn at the suggestion of the court, that certain questions of law might be determined on the writ and petition of plaintiff, and a demurrer to said writ considered; which being overruled after hearing by the court, defendant was granted leave to file his return; and the counsel of defendant knowing said facts, and believing by said precedent it was the practice of this court, filed his demurrer in this case, with no intent to waive and no idea that the right to make return would be waived or lost thereby, and announcing at the time of filing the same that a return was prepared which defendant would ask leave to file should the demurrer be overruled. And defendant states that the ruling of the court in granting the peremptory writ, on overruling said demurrer, without granting defendant leave to make his return, has taken defendant by surprise, and his right will be greatly prejudiced unless this honorable court, for the reasons aforesaid, set aside said order granting said peremptory writ, and grant the defendant leave to file his return to said alternative writ.

*Harding & Crane*, for relator.

Section 1 of the statute respecting the writ of mandamus (G. S. 1865, p. 632) provides that the person who by law is required to make return to the writ shall make return to the first writ of mandamus. Section 2 provides that the person suing or prosecuting such writ shall plead to or traverse all or any of the material facts contained in such return. Sec-

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tion 3 provides that the person making the return shall reply, take issue, or demur.

It is evident from the above that the party to whom the writ is directed can in the first instance do nothing but reply to the alternative writ. He may reply by admitting the facts, and arguing that, upon the facts as admitted, the plaintiff, or relator, had no cause of action, or he may traverse the facts alleged in the petition. In either case he selects his own remedy, and is concluded by his election under the provisions of our statute. In either case it is a return; and if his return should take the form of a demurrer, there is no provision for answer over, as in ordinary cases. To show how the plaintiff would be restricted as to pleading over if he had demurred, we refer to *The People v. Fingor*, 24 Barb. (S. C.) 348; *The People v. Ransom*, 2 Comst. 490.

But, without referring to authorities in other States, where the constitutional and statutory provisions respecting the remedy by mandamus differ from ours, it seems sufficient to say that the form of pleading and the effect of pleadings appear to be fixed by our statute. It is an extraordinary remedy to be used in extraordinary cases, and there can be no analogy between the pleadings in ordinary cases and this proceeding further than the statute creates the analogy.

*Opinion of the Court upon motion for leave to file a return to the alternative writ.*

FAGG, J.—There can be no controversy about the requirements of the statute in relation to the formal steps to be taken in a case of this sort, where they are insisted upon at the proper time. It is clear that the issues should be made up on the return to the alternative writ, and the practice in this court has been, for the purpose of reaching the legal questions involved, to assume that the necessary steps in pleading have been taken whenever it is apparent from the facts presented that such questions do properly arise.

It can make but little difference what name is given to the paper filed by the defendant to the alternative writ. The

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counsel chooses to call it a demurrer, but in the very first sentence the following language is used: "*The defendant, for answer and return to said writ, demurs to the petition and writ of the plaintiff,*" &c. The entire paper seems to be an effort to show cause, by setting out in detail the facts in the case and reasons, why the peremptory writ should not be granted. This is to all intents and purposes a return to the alternative writ, and we have proceeded to consider the whole case as upon a demurrer to it. In this course it is conceived that we are fully justified by the former practice of the court. Reference is made particularly to the case of *Dunklin County v. The District Court of Dunklin Co.*, 23 Mo. 449. The motion for leave to file a return is accompanied by an exhibit containing the matters proposed to be set up in the answer to the writ, and it has been examined with some care to see if there is really any additional cause shown for the refusal of the writ.

For the reasons stated in the opinion heretofore given in this case, all that portion that pertains to the legality of the election and the certificate issued to the plaintiff, as well as the allegation in relation to his failure to execute a good and sufficient bond as sheriff, must be excluded from consideration. The commission issued by the Governor was conclusive upon the County Court as to the right of plaintiff to the office of sheriff, and it is not within the province of that tribunal to inquire into the sufficiency of his bond as such. Having treated the orders made by the County Court at the time of declaring the office of sheriff vacant, and such as were made subsequent thereto, as mere nullities and without any authority of law, it will not be necessary to consider so much of the proposed return as relates to them.

It seems to be admitted that the plaintiff did, within the time limited by the order of the court in relation to the filing of a new bond, appear and present for its approval a bond in the penal sum required in the order, but it is averred that in the mean time it had been ascertained that the revenue would actually amount to the sum of \$100,000, and that

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therefore the bond was insufficient on that account. Admitting this to be a true statement of the facts, it would seem to be a great hardship upon the plaintiff, after fixing the penalty at a specific sum and giving him only ten days to procure solvent sureties for so large an amount, to say to him when his bond was presented that there was a mistake in the amount of the revenue to be collected, and his bond was not large enough by at least \$30,000, and must be rejected. What was the necessity for this hasty action on the part of the County Court? If a mistake had been committed in reference to the amount for which the bond was required to be given, Adamson was certainly not responsible for it. He had been led into error by the action of the court itself and common fairness would seem to require that some additional time ought to have been given him to file a new bond and hunt up additional sureties. Certainly the public interest could not have suffered by pursuing such a course, and it is fair to presume that the plaintiff could not comply with the requirements of the court at once, but ought to have had a reasonable time given him to do so. The question as to the solvency of the sureties offered by the plaintiff seems really to cut but a small figure in the transaction, and great stress is laid upon the fact that the penalty of the bond offered by the plaintiff was not double the amount of the revenue to be collected, and therefore it was not such a bond as the law required. Then admitting the solvency of the sureties offered, the theory of the court would seem to be that no further time could be given to the plaintiff, and the bond must at once be rejected for insufficiency and the office declared vacant. There is much in this transaction that does not harmonize with the theory that the court was acting in the exercise of a sound and just discretion in the premises. There is nothing in the statute that prohibits the County Court from requiring the collector, at any time when the protection of the public interest would seem to demand it, to give additional bond and security. In all cases, however, he would be entitled to a reasonable time to comply

with the order of the court; and if it is not given, and no good cause shown to the contrary, the presumption would be that the court had acted in an arbitrary and unjust manner.

The proposed return, stripped of all the matters which we have intimated do not properly belong to the investigation of this case, is narrowed down simply to the action of the County Court upon the bond presented by plaintiff as collector. It is therein admitted that the bond was presented within the time prescribed by the court. It is averred that it was insufficient in the amount of its penalty; also that the sureties were not together worth more than half that sum, and that the court proceeded to hear all the testimony offered by the plaintiff to prove their solvency.

If, as alleged, there was at the time an examination into the sufficiency of the bond, some record of the fact as well as the judgment of the court ought to be shown in proof of it. There is nothing of that sort appearing, and the presumption arising upon the case as presented is that there was not in point of fact any judicial investigation or determination of that fact. A copy from the assessor's books showing the several amounts at which the sureties upon the bond had been assessed is annexed to the return, and much weight seems to be attached to this sort of testimony for the purpose of sustaining the action of the court. We think it should not be held in any case as conclusive upon the amount of the property owned by any individual; but, in the absence of other testimony more direct and reliable in its character, it is not disputed but that a certain amount of weight might be attached to it. The fact is well known, however, as a part of the history of the State, that these assessments—almost without an exception—are very far below the actual value of the assessed property. The sworn statements of the parties themselves, as shown by the papers and exhibits in the cause, places the aggregate amount of the value of all their property at something more than \$270,000. Assuming, however, that this is too high an estimate, and believing that the assessment is much too low, as it is ordinarily in almost every

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county in the State, it would be safe perhaps to put the amount just half way between the two. The amount of the assessment being about \$145,000, half the difference between the two estimates would fix the true sum at \$207,000. This would be sufficiently large to cover the second estimate of the revenue made by the County Court, and make the bond in all respects amply sufficient. In this view of the case, we have really given the respondent the benefit of all the facts proposed to be set up in the return to the alternative writ.

We see nothing in the facts stated to change the conclusion reached in the former opinion, and the respondent's motion must be overruled. The other judges concur.

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JAMES HILL, SR., and JAMES W. HILL, Appellants, v. JOSIAH FOGG and JAMES T. FOSTER, Respondents.

1. *Corporations—Dissolution—Assets—Equity.*—When a corporation is dissolved, a court of equity will lay hold of the assets for the purpose of applying them to the payment of creditors, as against others than *bona fide* creditors and purchasers.
2. *Corporations—Dissolution—Trust.*—A sale by a corporation of its property, in good faith and for a valuable consideration, does not amount to a dissolution of the corporation, nor make the property sold subject to a trust for the benefit of creditors in the hands of such purchaser.

*Appeal from St. Louis Circuit Court.*

This was a bill in equity brought against defendants to enforce a payment by them of a judgment obtained by plaintiffs (appellants) against a corporation called "The Copper Creek Mining and Mineral Company."

At the trial, the plaintiffs called as a witness one of the defendants, Josiah Fogg, who testified as follows: "I became a stockholder in the Copper Creek Mining and Mineral Company on the 9th of December, 1862. The capital stock at the time was \$50,000. On the day that I became a stockholder, Jas. E. Blythe, H. M. Thompson, Jas. T. Foster, and

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myself, were chosen directors, and we owned all of the stock of the company, each having one quarter. I have not disposed of my interest in the company. I do not know that the company ever had any property. It held itself out to the world as a company. The debt on which this suit is based was contracted, as I am informed, in behalf of the company and for its benefit. Debts were contracted in the company's name, and business was transacted in the same name. Mr. Foster acted as the company's agent. There was a piece of property at Frederickstown deeded to me in trust for the stockholders of the company. This is the deed. This is a deed of warranty from James T. Foster and wife as parties of the first part, and Josiah Fogg, trustee, being appointed for the purpose of holding this property in trust for the use and benefit of the stockholders of the Copper Creek Mining and Mineral Company, of the city and county of St. Louis and State of Missouri, party of the second part—the property being described in the deed, which was dated December 10, 1862.”

The witness further stated: “The sum of \$40,000, mentioned in the deed of trust, was the nominal consideration. The property was bought subject to deeds of trust amounting to about \$10,500; \$2,500 was payable to one Hall, and \$8,000 was due to Brown, Burgess, and Selden. Foster was to have a one fourth interest in the company and its stock, and *his was considered as paid up stock*. Blythe, Thompson and I endorsed the notes secured by the deeds of trust encumbering the property—and the property was to be held to protect us against these notes; this was the understanding between us at the time. The land cost us about \$16,000. As a part of the transaction, and as a part consideration for the purchase, Blythe, Thompson and I gave our notes to Foster for \$1,290, which I afterwards paid. It was understood that we were to be reimbursed out of the property which was supposed to be worth more than all the encumbrances, and it was promised me that I should be at no expense in the matter. I was not a member of the com-

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pany when Foster conveyed to me. When the deeds of trust became due, we were notified that they must be paid or the property would be sold. Foster thereupon got up an arrangement with Sickles and Billings. The Frederick Nickel Company was organized under the general laws of the State, and the property which I held as trustee for the stockholders of the Copper Creek Company was sold to that new company in July, 1864. The sale was made to get back what we had paid out of pocket. I think that the amount due to Hall was paid before July, 1864. One half of the property was sold to J. B. Sickles and Frank L. Billings for \$4,000. The property was sold by me with the consent of Foster, Blythe, and Thompson. Blythe and Thompson received nothing from the sale, except that it was agreed that they should be relieved from all liability under the deeds of trust; Sickles and Billings were to have three tenths of all the stock of the new company, and I had three tenths, and the other four tenths were to be reserved stock in which Sickles and Billings were to have one half interest and I was to have the other half. Sickles and Billings paid \$4,800 for improvements of the property, as Billings told me; I only speak from what I was told by Billings. At the time the \$4,000 was paid, Foster got \$2,000 and I got \$2,000. Foster charged \$500 for his negotiation, which he received. In all there was \$2,000 passed over to Mr. Foster on account of this sale. Of the \$4,000 received at this sale, \$3,500 was applied by me on the deeds of trust, \$1,500 coming from Foster; the balance due on the deeds of trust I paid. Besides the \$4,000 already spoken of, Billings and Sickles also put in \$4,800 to develop the mines, for which they took a lien on the reserved stock."

The witness further said: "I have before stated that Blythe and Thompson were insolvent at the time of the sale to the Frederick Nickle Company. I never paid anything for it."

Ques. "Was not the assumption by you, Blythe and Thompson of the payment of the notes secured by the deeds

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of trust understood to be a consideration for the stock which you respectively held in the Copper Creek Company?"

Ans. "Perhaps it might be so considered; I have stated what the facts were."

J. B. Sickles testified that he and Billings bought a one half interest in the property at Frederickstown, and thought that they paid between six and seven thousand dollars, and understood that the purchase was to be made from Fogg and Foster.

Levi W. Renelle testified that between December, 1862, and July, 1864, there were put upon the property at Frederickstown improvements consisting of a crushing machine, a mill, a reservoir, and other improvements, amounting in the aggregate to about \$2,000 in value; and that the mines were worth at any time, between 1862 and 1864, and still are worth \$20,000; that Foster had told him they were worth \$100,000.

W. B. Tolar testified that the lands and mines at Frederickstown were considered valuable; that he considered them worth \$100,000; that valuable improvements had been put upon the premises in 1863 and 1864.

Samuel C. Collier testified that the mines and property were valuable, and thought that to a party having capital and skill they would be worth \$100,000, and pay a good dividend on that sum.

This was all the evidence in the case. The court ordered the bill dismissed.

*Cline, Jamison & Day*, for appellants.

The petition proceeds on the ground that the plaintiffs had a debt and execution therefor against a corporation, that there was no corporate property out of which it could be made, but that the defendants being stockholders had sold the corporate property, thus taking it out of the reach of the plaintiffs, and appropriated the proceeds to themselves. And it is sought to follow the proceeds of this sale in the hands of the defendants on the ground that the corporate property

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was primarily liable for the payment of the debts of the corporation, and that when converted by the stockholders it can be followed by creditors as a trust fund liable for the payment of their debts—Wood v. Dummer et als., 3 Mas. C. C. 308.

The same principle in regard to the liability of stockholders is laid down in Vose v. Grant, 15 Mass. 491 & 522; Spear v. Grant, 16 Mass. 15; Scott v. Eagle Fire Co., 7 Paige Ch. 198; Bigelow v. The Congregational Society of Middleton, 11 Vt. 283.

The doctrine of Wood v. Dummer is sanctioned in Cooper v. Frederick, 9 Ala. 142. See also Bk. of St. Mary's v. St. John, Powers & Co., 25 Ala. 602; Gratz v. Reid, 4 B. Mon. 195-7; Dudley v. Price's Adm'r, 10 B. Mon. 84; Taylor v. Miami Exporting Co. et als., 5 Ohio, 164; Percy v. Millaudon, 3 Lou. An. 585.

*Currier*, for respondents.

I. The Copper Creek Mining and Mineral Company is not shown to be extinct, and is therefore a necessary party to these proceedings—3 Mas. C. C. 315; 2 id. 181.

(a) The petition is framed on the assumption that the defendants hold effects belonging to this corporation, and prays an application of them to the plaintiffs' use without giving the corporation an opportunity to be heard.

(b) The plaintiffs falsely assume that the sale of the corporation party dissolved it, and presents this as an excuse for not joining the corporation and making it a party to the suit.

The petition does not state facts sufficient to constitute a cause of action or justify the interference of a court of equity. the allegations of the petition resulted in this—that the proceeds of a sale of a certain property alleged to belong to the Copper Creek Mining Company came to the possession of the defendants, and were held by them when this suit was instituted. This sale, which is presented as the foundation of this suit, is alleged to have been made, not by the cor-

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poration, but by its stockholders. But the stockholders, as such, could not alienate the corporate property. The sale therefore was void and of no effect, and passed no title. Corporation property must be conveyed by the corporation acting through its corporate officers. Had the sale been made by the corporation itself, that fact would not help out this suit, since it is not alleged that the corporation distributed the proceeds of the sale to the defendants as their property. The petition, at the most, presents the defendants as the custodians and holders of effects of the corporation, or else as debtors to it; and in either case subject to garnishment. If it were true that the defendants held corporate effects, as alleged, then the corporation is not insolvent, since the assets were sufficient to pay the debts—Sto. Eq. Jur. § 1252; Wood v. Dummer, 3 Mas. C. C. 308; Mumma v. Potomac Co., 8 Pet. 281, 286; Vose v. Grant, 15 Mass. 505, 517, 522; Spear v. Grant, 16 Mass. 91, 15.

II. The proof negatives the allegations of the petition averring corporate effects in the hands of the defendants. It is not shown in proof that the corporation ever owned a dollar of property. The deed from Foster to Fogg, read in evidence, rests the title to the property therein described in Fogg as trustee to the use, not of the corporation, but of parties owning the stock of the corporation. It was manifestly not the intention of this conveyance to vest any title, legal or equitable, in the corporation. The proof shows that the property was encumbered at the time of the conveyance by deeds of trust for \$10,500, and that the notes of Fogg and others to Foster for \$1,290 were a charge against it, making \$11,750. All this was to be satisfied out of the property; and the sale to Billings and Sickles shows that the entire property in 1864, at the time of this sale, was worth no more than \$8,000—one half interest being sold to Billings and Sickles for \$4,000 cash, leaving Fogg to reimburse himself for his advances, amounting to some \$10,000, out of the other half interest, as best he could.

HOLMES, Judge, delivered the opinion of the court.

This was a petition in equity on behalf of the plaintiffs and others as creditors of the corporation called the Copper Creek Mining Company, praying that the defendants might be charged with the amount of the debt due them from said corporation to the extent of the assets of the corporation (which it was alleged had been dissolved) which had come to their hands subject to a trust for the payment of debts.

Certain lands had been conveyed to Josiah Fogg in trust for the benefit of the stockholders of the Copper Creek Mining Company. Admitting that this deed created a trust for the use of the corporation, the evidence clearly established the fact that the property had been sold, and the proceeds applied to the payment of prior liens and the demands of other creditors. Where a corporation is dissolved, there is no doubt that a court of equity will lay hold of the assets for the purpose of applying them to the payment of the creditors as against others than *bona fide* creditors and purchasers. The evidence wholly failed to show that any moneys or assets belonging to this corporation had come into the hands of the defendants, which had not already been applied to the payment of prior liens on these lands and to the extirpation of the claims of *bona fide* creditors of the corporation.

Even if this corporation owned any interest in these lands, a sale of their property to another corporation *bona fide* and for a valuable consideration would neither amount to a dissolution of the corporation nor make the property sold subject to a trust in the hands of such purchaser for the benefit of the creditors—*Powell v. North Mo. R.R. Co.*, Oct. T., 1867. Nor does it appear that the proceeds of the property sold came into the hands of the defendants merely as stockholders by way of distribution among them.

On the whole case made, we find no equity in the petition. Judgment affirmed. The other judges concur.

PHILIP HARTMAN, Appellant, v. JNO. C. VOGEL, Respondent.

*Fraudulent Conveyances—Goods and Chattels—Possession by Vendor.*—As to creditors and subsequent purchasers in good faith, the presumption of fraud, raised by the continued possession of goods and chattels by the vendor after sale, will be conclusive unless it be made to appear to the jury on the part of the person claiming under such sale, that the same was made in good faith and without any intent to defraud creditors or subsequent purchasers. When the fact is shown that there was no actual and continued change of possession, the burden of proving the good faith of the sale rests upon the claimant. (R. C. 1855, p. 805, § 10.)

*Appeal from St. Louis Circuit Court.*

The plaintiff prayed the following instructions, which were refused :

1. If the jury believe from the evidence that plaintiff, Philip Hartman, had endorsed some promissory notes for Hugo Wehrfritz to the amount of \$2,000 to secure a debt or debts due by Wehrfritz alone, and that after he had so endorsed such notes the said Wehrfritz sold to said plaintiff Hartman, among other property, the property described in the petition for the purpose of securing said Hartman against any loss or damage which might arise out of his endorsement of said notes, and that said Hartman so received said property and afterwards paid said notes, and that there was no confederation between said Hartman and said Wehrfritz to defraud creditors of said Wehrfritz, then the jury will find for plaintiff for the possession of said property.

2. The jury are instructed that to render a bill of sale void as to creditors, the sale must have been made by virtue of confederation and combination between the seller and buyer to hinder and delay or defraud the creditors of the seller; and if the jury believe from the evidence that no such combination or confederation existed between said Wehrfritz and said Hartman, but that Hartman purchased said property for an adequate valuable consideration, with the view only of securing his own claim against said Wehrfritz, then said bill of sale is good against any creditors of said Wehrfritz, and plaintiff is entitled to recover in this suit.

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The defendant asked the following instructions, which were given :

1. Although the jury may believe from the evidence that the plaintiff, prior to the sale in question, had advanced \$200 to Wehrfritz, and had endorsed two notes for him amounting to \$2,000, and on that account and in consideration thereof the said Wehrfritz made to plaintiff the bill of sale read in evidence ; yet if the jury believe from the evidence that, after said sale, said Wehrfritz continued in the possession or had control of said property, then the jury shall presume said sale to be fraudulent and void as to the creditors of said Wehrfritz, unless they are satisfied that the same was made without any intent to hinder, delay or defraud creditors. And the jury are further instructed that the burden of proving said sale to have been made in good faith, and with no intention to hinder, delay or defraud the creditors of Wehrfritz, devolves upon the plaintiff in this case.

2. If the jury find for the defendant, they will find the value of the property taken, and the damages for the detention of the same, each separately.

Of its own motion, the court gave the following instructions :

1. The court instructs the jury that a debtor, even though he may be in embarrassed circumstances, has a right to prefer his creditors and make provision for the payment of any one, or a part of his creditors, without providing for the others ; and if the jury believe from the evidence that Wehrfritz was justly indebted to said Hartman at the time of the execution and delivery of the bill of sale given in evidence, in the sum of money specified in the bill of sale, or thereabouts, and that said bill of sale was made in good faith by said Wehrfritz, and delivered to and accepted by said Hartman, together with the property therein conveyed, for the *bona fide* purpose of paying said amount so due and owing by said Wehrfritz to said Hartman, then there was a sufficient consideration

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for said bill of sale, and said plaintiff Hartman is entitled to recover in this suit.

2. If the jury believe from the evidence that at the time of the commencement of this case the plaintiff was the owner of the property for which suit is brought, then the jury will find for the plaintiff.

*F. & L. Gottschalk*, for appellant.

*Bakewell & Farish*, for respondent.

FAGG, Judge, delivered the opinion of the court.

The appellant Hartman commenced his action against Vogel in the St. Louis Circuit Court under the statute relating to the claim and delivery of personal property. At the time of the institution of the suit, Vogel was the acting sheriff of St. Louis county. The property sued for consisted of certain goods and merchandise shown to have come into his possession by virtue of a writ of attachment levied upon the same in favor of James Reilley and against one H. F. Wehrfritz. Hartman claimed to be the owner of the goods in question by virtue of a bill of sale executed to him on the same day of the levy by the sheriff. This bill of sale purported to convey the entire stock then in the store of Wehrfritz, in consideration of the sum of \$2,000. The testimony on the part of the defence all went to show most conclusively that from the date of the execution of the bill of sale up to the 20th of February following, there was no change of the possession of the goods. Wehrfritz continued to occupy the same storehouse, doing business in his own name, as he had formerly done, and selling off the identical stock that he had conveyed to Hartman. At the last mentioned date he sold the entire stock then remaining on hand to one Luffort, and executed a bill of sale to him for the same. There was testimony for the plaintiff in rebuttal tending to explain the sale of a part of the goods by Wehrfritz after the bill of sale to Hartman had been executed, and to show that the consideration expressed

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upon the face of it was a debt actually due on account of money paid by the plaintiff to the use of Wehrfritz.

Upon such a state of facts, it is manifest that the only question for the jury was whether the sale made to the plaintiff was a *bona fide* transaction, or a mere cover to shield the property of Wehrfritz from his creditors. The 10th section of the act in relation to fraudulent conveyances (R. C. 1855, p. 805) has been sufficiently interpreted by the former adjudications of this court. There can be no question under this statute, that as to creditors or subsequent purchasers in good faith the presumption of fraud raised by the continued possession of the goods and chattels by the vendor after sale will be conclusive, "unless it be made to appear to the jury on the part of the person claiming under such sale, that the same was made in good faith and without any intent to defraud creditors or subsequent purchasers." When the fact is shown, therefore, that there was no actual and continued change in the possession of the property, the burden of proving the *bona fides* of the sale rested upon the claimant. The instruction given upon this point at the instance of the defendant constitutes the chief ground of complaint on the part of the appellant. The facts necessary to be proved in order to place the *onus* upon the plaintiff were hypothetically stated and the instruction so framed as to make it unobjectionable. The words "hinder or delay" in addition to the word "defraud" could not vitiate the instruction. The answer averred in terms that the claim set up by plaintiff to the property sued for was fraudulent and made for the purpose of hindering and delaying the creditors of Wehrfritz.

The instructions all taken together placed the law of the case fairly before the jury, and we see no error in the refusal of the two instructions asked for by plaintiff.

The instructions given for the plaintiff stated the issue properly and in terms sufficiently plain and simple to prevent any confusion in the mind of the jurors. Those that were refused contained substantially the same declarations of law,

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but in a different form, and were based upon a hypothetical statement of facts likely to mislead and confuse the jury.

With the concurrence of the other judges, the judgment will be affirmed.

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STATE *ex rel.* HENRY C. ALLEN, Relator, *v.* THE JUDGES OF  
THE ST. LOUIS CIRCUIT COURT, Defendants.

1. *Supreme Court—Practice—Reversed and Remanded—Circuit Court.*—Where a decree of the inferior court is simply reversed for error by the Supreme Court, and the case remanded for further proceedings, the inferior court is not required to enter up judgment for the appellant or plaintiff in error, but may re-try the case, following the opinion of the Supreme Court upon questions of law; except in cases where special directions are given by the Supreme Court.
2. *Practice—Supreme Court—District Court.*—The rules of practice established for the guidance of the District Courts, G. S. 1865, ch. 135, are also applicable to the Supreme Court.
3. *Practice—Cases in Equity and at Law—Pleadings—Trials.*—The pleadings in equitable cases are to be the same in form as in cases at law, and issues of fact or law are to be made up in the same way in both classes of cases; the evidence is to be produced under the same rules and to be preserved in the same way by bills of exceptions; exceptions, bills of exceptions, new trials, and appeals, are governed by the same provisions. In equity cases, all the material evidence should be incorporated into the bill of exceptions, for the case is to be heard in the Supreme Court upon the pleadings and the evidence, and the whole case will be passed upon by the Supreme Court and decided accordingly.

*Petition for Mandamus.*

*Ladue and Birge*, for relator.

I. The Supreme Court should grant a writ of mandamus where there is no other legal remedy or means of enforcing a right which the applicant is legally and equitably entitled to, and which is legally demandable of the person to whom the writ is directed—Tap. on Mand. 29.

II. The Circuit Court, in this case, by refusing to grant a motion to enter judgment in accordance with the mandate of the Supreme Court, has subjected itself to a writ of manda-

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mus commanding them to do so—the same being a proper motion and in accordance with the chancery practice—7 Paige Ch. 108.

III. After a cause in chancery has been heard below on bill, answer, and proof, and no exceptions taken or questions of law reserved by either party, and cause appealed to Supreme Court, and judgment below reversed on a review of the facts, and cause remanded to the court below for further proceedings, in accordance with the decisions of the Supreme Court; the court below cannot legally permit a rehearing of the cause, but should render judgment according to the decision of the Supreme Court—6 Wis. 295; 7 Wis. 100; 4 Sandf. Ch. 369; 5 Hill, (N. Y.) 507; 1 John. Ch. 189; 4 Paige Ch. 409; 6 id. 473; 2 id. 45; — Hard. (Ky.) 447; 1 Har. (Del.) 413; 12 Sm. & M. 513; 15 How. (U. S.) 459, and cases cited; Sto. Eq. Pl. § 414.

IV. In equity cases, where the whole issue has been passed upon by the appellate court and the judgment of the court below affirmed or reversed, no rehearing will be granted unless it appears by affidavit or proof that new evidence has been discovered which could not have been produced at the former trial, which if it had been produced and allowed would have been sufficient to have changed the result, or that something new has transpired since the former hearing which would have changed the result; and it must appear that the facts are sufficiently clear and strong to maintain a bill of review in case a final decree had been entered—3 Sto. R. 298–325; 5 Mas. C. C. 312; G. S. 1865, p. 549, §§ 41, 44, & 46.

*Sharp & Broadhead*, for defendants.

When we look to the statute to learn the legal effect and meaning of the decision of this court, it will be seen that by § 41, p. 549, G. S., that the court “in appeals or writs of error shall examine the records and award a new trial, reverse or affirm the judgment or decision of the Circuit Court,

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or give such judgment as such court ought to have given, as to them shall seem agreeable to law."

Sec. 44 provides, the court, "upon the determination of any cause, in appeal or error, may award execution to carry the same into effect, or may remit the record with their decision thereon to the court from whence the cause came, and such determination shall be carried into execution by such court.

Thus by § 41 the court may either affirm or reverse and remand for another trial, or give judgment itself, either as it thinks just and right. And by § 44, if it gives judgment itself, it may either award execution, or remit the record with its decision thereon to the Circuit Court to execute the judgment which has been rendered.

If this court, when it heard the cause on appeal at the last term, had given judgment (as it might have done if it considered the case in a proper condition therefor, and the law and ends of justice carried out thereby), it would, as required by law, either have awarded execution, or remitted the record to the Circuit Court with an order to execute such judgment. But neither and nothing of the kind was done; it only reversed the decision of the Circuit Court and remanded the cause for further trial; it did not render any judgment.

The opinion states that the court below ought to have rendered a different decision on the case than the one that it did, and therefore it reverses that decision and remands the case to that court; but no judgment is rendered by this court, no execution awarded, nor the transcript remitted, with orders to execute any judgment. But when the decision of the court below was reversed and the cause remanded, what was it remanded for? The mandate to the Circuit Court says plainly—"for further proceedings in conformity with the opinion of this court." The Circuit Court must try the case upon the rules and in conformity with the declarations of the law laid down by this court, and if no other state of facts appears than was seen by the record here,

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then declare certain deeds fraudulent; this and nothing else could the Circuit Court do under the decision and mandate. Not only was no judgment rendered by this court and no execution awarded, no order to the court below to execute any judgment, no order remitting the record to the Circuit Court, but the opinion of this court shows that no such thing was intended; for its language is that the court below, on the facts before it on the former trial, ought to have rendered a different judgment, and its judgment is reversed—no order that it shall render and execute any kind or form of judgment. The mandate of this court to the Circuit Court follows the opinion; it remands the cause to that court for trial, for further proceedings, in conformity with the opinion.

We submit, then, that the Circuit Court properly refused the prayer of the motion, and, under the law, the opinion of this court, and the mandate; it could not and cannot take any other course than proceed to try the cause in conformity with the opinion of this court. Such has been the universal and uninterrupted practice and construction of the courts and bar of this State from the earliest existence of the State. The statute of Wisconsin differs from ours—Stat. of Wis. 1858, p. 639, §§ 6 & 7.

If at the same term this case was heard here, while this court had the whole case before it, it could, if applied to, order the court below to enter judgment and specify in its order what judgment to render; but this was not done or applied for. Now, this mandamus is asked for to compel the court below to enter a judgment when it was not ordered to do so, and the mandate to it did not require it or authorize it under the statute; the court below has not refused to carry out any order of this court, and is discharging its duty.

HOLMES, Judge, delivered the opinion of the court.

This is a petition for a *mandamus* upon the St. Louis Circuit Court. It is stated that upon the filing of the mandate from this court in the case of Allen v. Berry et al., 40 Mo.

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282, the petitioner moved the Circuit Court for judgment in said cause according to the decision of this court; that the motion made at the special term was reserved for a hearing at the general term, and was certified back with instructions to deny the same, and that thereupon he renewed his motion at the special term, and the same was overruled; wherefore he prays a *mandamus* to said court to compel them to grant said motion.

The judges make return "that it is not the practice of the court to enter up judgment without a rehearing of the cause, where it has been reversed and remanded, according to the judgment and mandate of the Supreme Court in such cases, and that there had been no such rehearing of the cause." The case is submitted on a demurrer to this return.

The case of *Allen v. Berry et al.* was a suit in equity, and upon a hearing of the cause in this court on appeal from the St. Louis Circuit Court, the judgment was reversed and the cause remanded. No other decree was rendered in this court. No special directions were given in relation to further proceedings in the court below, beyond the questions determined and the principles laid down in the opinion.

The petitioner insists that the court below shall be required to enter up judgment for the plaintiff in said cause, according to the decision of this court, without opening the case for further evidence, and without a rehearing in that court.

This motion proceeds upon an entire misconception of the laws and practice in this State in equity cases. The statute of 1855, relating to practice in the Supreme Court, provided that this court "in appeals, or writs of error, shall examine the record, and award a new trial, reverse or affirm the judgment or decision of the Circuit Court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law"—R. C. 1855, p. 1301, § 35. This statute was not reenacted in the revision of 1865, otherwise than as it was incorporated into the chapter (135) concerning the District Courts, in which the particular section, like nearly all the rest,

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is applied to the District Courts ; but we have held that this chapter applies to this court also, so far as its provisions may be applicable under the forty-sixth section ; and the practice of this court in respect of the matter in hand remains the same as it was before the revision.

The practice acts of 1849, 1855, and 1865, have in a great measure, if not altogether, superseded the practice in chancery of the code of 1845, and have, to a large extent, though not entirely, assimilated the forms of proceeding in equity to those in cases at law, without abolishing the distinctions in principle between common law and equity jurisprudence. Nor have the differences in the modes of proceeding been wholly abolished, but they are in many respects expressly recognized by the existing practice act, and are embodied in its provisions. The pleadings are to be the same in form, but may be different in the contents. Issues of law or fact are to be made up in general in the same way in both classes of cases (ch. 169, §§ 1-4) ; the distinction between trials by jury and trials by the court is preserved, and particular issues may be made up and sent to a jury for the purpose of taking the opinion of the jury upon any specific question of fact involved in the case, as in the former equity practice (§§ 11-13 ; Conran v. Sellev, 28 Mo. 320) ; the evidence is to be produced under the same rules and preserved in the same way by bill of exceptions ; exceptions, bills of exceptions, new trials, and appeals, are governed by the same provisions (ch. 172) ; and all cases are to be set for trial in the same manner. Under the practice act of 1845 (in chancery), an equity case was specially set down for a hearing at the next term after the cause was at issue, and witnesses were examined orally, and depositions were read, in the same manner as at law, but provision was made that all the testimony should be reduced to writing on the trial and preserved in the record, and the cause was heard in this court upon appeal upon the pleadings and the evidence thus preserved. The practice of taking all the testimony in written depositions, and making publication of the depositions taken, and closing the case against the in-

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roduction of further evidence after publication passed, did not prevail in this State. If the evidence were not fully preserved in the record as the statute required, the omitted evidence was not heard upon appeal to this court—*Bean v. Vallé*, 2 Mo. 126. If the evidence preserved did not support the decree rendered in the court below, the case was reversed in this court (*Baker v. McCarty*, 5 Mo. 1); and if proper, it was remanded for a new trial (*LaBarge v. Chauvin*, 2 Mo. 180). The evidence is now to be contained in the bill of exceptions in the same manner as in cases at law, and it is apparent that especial care should be taken, in equity cases, that all the material evidence should be incorporated into the bill of exceptions, for the case is to be heard in this court upon the pleadings and the evidence. If the decree or judgment be found to be correct upon the case made, it will be affirmed; if erroneous, or unsupported by the evidence, it will be reversed, and either remanded for a new trial, or the petition be dismissed: and in such case, if this court can proceed to render such judgment or decree in this court as ought to have been given below, on the case made, it will do so; but if that cannot properly be done, the judgment is necessarily to be reversed, and the cause dismissed or remanded for a new trial or hearing in the court below—*Rutherford v. Williams*, Oct. T., 1867. A reversal may not affect any orders or proceedings which have been had prior to the final order or decree from which the appeal is taken, but that judgment is annulled by its reversal, and there must necessarily be a new hearing so far, and another final judgment must be rendered from which an appeal may be taken.

In *Knowles v. Morris*, 16 Mo. 455, the evidence was preserved by a bill of exceptions; the court was not satisfied that the decree was correct, nor could they proceed to render a proper decree upon the record as it was; and it was said by *Gamble, J.*, that "the appeal in chancery brings the whole case before the court upon the law and the facts, and the decree to be rendered here when the whole case is properly presented, is, in general, a final decision of the cause;

but in the present case no such decree can be rendered." The decree of the Circuit Court was therefore reversed, and the cause remanded, with directions to have an account taken and stated, and a new decree was to be rendered upon another hearing, which would be subject to review in this court on appeal. It was said also that it would not be proper here to lay down the principles upon which the account was to be stated, as the Circuit Court was charged with that duty as a part of its original jurisdiction. It is very probable that a decree might be rendered in this court, in a proper case, which would require further proceedings in the court below, by reference or otherwise, on the basis of the decree rendered, and for the purpose of carrying it into execution. But this is no such case. No decree was given in this court beyond a reversal, and the cause was simply remanded for a new trial.

In such case, the opinion may settle the principles by which the case is to be governed, and directions may be given, in suitable cases, as to the proper course of proceeding in the case; and it is to be presumed that the court below would consider itself in duty bound to follow the principles determined and to pursue the directions given; but this court cannot direct the inferior court what judgment it shall pronounce in the exercise of its original jurisdiction. That must be the judicial act of the Circuit Court itself. Nor can the Circuit Court proceed to give judgment without a hearing. Nor is there any law to preclude either party from offering such evidence upon the new hearing as may be competent and admissible. There is no such thing in our practice as a final closing of the evidence upon publication passing.

It is considered that the authorities which have been cited from other States where the practice in chancery is governed by different statutes, or by the English chancery practice, have no application here upon this question. Nor are the cases of bills of review, or supplemental bills, for the correction of decrees rendered and still remaining unreversed,

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at all in point. The statutes of New York directed that when appeals shall have been determined in the Court of Appeals, a *remittitur* should be sent down with the proceedings, order or decree to the court below for such further proceedings as might be necessary to carry it into effect—2 Hoff. Ch. Pr. 51. The cases cited from that State show scarcely more than that a rehearing is not to be had, as a matter of course, upon any decree that is already established by the appellate court.

In the case of *Miner v. Medbury*, 7 Wis. 100, two motions were made in the appellate court, one for a rehearing, and the other for an amendment of the *remittitur*, by adding a direction to the court below to enter judgment according to the decision. Both motions were overruled. It was said that the court would presume that the inferior court would proceed to carry out the judgment according to the views expressed in the opinion; and it was denied that the case would be open for further testimony and for a trial *de novo*. It was said that the court below ought to proceed to final judgment in conformity with the decision, without reopening the case for new testimony, and that the practice in Wisconsin remained "essentially the same in what were equity cases, since the adoption of the code." However that may have been in that State, it is very certain that no such practice has existed hitherto in this State, or can exist here, under the statute laws. On the contrary, when the case is simply reversed and remanded for a new trial and a new judgment, it is to be heard as before upon such evidence as either party may have to offer, upon the matter which is to be so heard anew.

The peremptory *madamus* is refused. The other judges concur.

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State ex rel. Auditor v. Clerk Jefferson Co. Ct.

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STATE *ex rel.* STATE AUDITOR, Relator, v. THE CLERK OF THE  
COUNTY COURT OF JEFFERSON COUNTY, Respondent.

*Revenue—Levy—Militia Tax, 1863—Omission.*—The military tax directed to be levied by the act of March 9, 1863 (Sess. Acts, p. 25), was to be levied in accordance with the general assessment made for that year. The general revenue act, G. S. 1865, p. 75, made the necessary provisions for a remedy in cases in which counties had omitted to levy the tax at the proper time, by requiring the clerk of the County Court to make out a supplemental tax-book for the collection of the omitted tax, upon the assessment for the year in which there was a failure to levy and collect the tax.

*Petition for Mandamus.*

*Krum, Decker & Krum*, for relator.

I. Mandamus is the proper remedy to compel a public officer to perform a ministerial duty, and there can be no question of the power of this court over the subject-matter or the person—3 Black. Com. 110; *Marbury v. Madison*, 1 Cranch, 62; *Postmaster-Gen. v. U. S.*, 12 Pet. 524; *Reeside v. Treas. U. S.*, 11 How. (U. S.) 287.

Under § 75, p. 110, G. S. 1865, it was the duty of respondent, when officially notified by the relator, to make out this supplementary tax-book.

II. The only question upon which any doubt can arise is, whether the tax imposed by the "Act to provide the means for the payment and support of the militia, approved March 9, 1863" (Sess. Acts 1863, p. 25), was levied and collectable in the year 1863; in other words, whether it should have been placed on the tax-book for 1863 by the clerk or assessor.

When the intention is clearly ascertained, it should be carried into effect even though it should seem contrary to the letter of the act—Bac. Abridg., tit. Stat. Construction, 4; *Jackson v. Collins*, 3 Cow. 89; *Wilkinson v. Leland*, 2 Pet. 662; *People v. Utica Ins. Co.*, 15 John. 358; *Munn v. Mech. Bk.*, 1 Pet. 64.

A thing that is within the intention of the law-makers of a statute, is as much within the statute as if it were within the letter; and a thing, although within the letter, is not within

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the statute, if it is not also within the intention of the law-makers—1 Black. Com. 59. How is this intention ascertained? In various modes: (a) In examining the cause or necessity for making it; (b) The circumstances under which it was passed; (c) The remedy intended to be promoted; (d) The policy of the enactment; (e) The general system of legislation upon the subject preceding or subsequent, repealed or unrepealed; (f) A long and uninterrupted practice is good evidence of the construction of the act.—McKeen v. Delancy, 5 Cranch. 22.

The object of this statute under consideration is plainly stated in the title, and appears fully in the several parts of the act; this object is to pay the militia for past services as well as accruing services within twelve months. The payment is to be made in twelve months, out of a fund created from taxes to be collected within twelve months. No construction will be adopted which will delay the (payment of these taxes (which are to create this fund) for two years. The act itself provides that it and all its parts shall go into immediate force and effect. The court will not construe the statute so as to delay the operation of the 12th section, which is the very marrow of the act, for a whole year.

By the 12th section, this tax is imposed; by the last section, it is provided that this act "shall go into effect from and after its passage." By the act, the bonds of the State were to be immediately issued to the soldiers, for past services as well as accruing services, to the amount of three million of dollars, in denominations of one, three, five, ten and twenty dollars, and all payable within twelve months, out of the treasury from the Union Military fund. Unless the 12th section is construed to go into effect at once, and as imposing a tax collectable with the other taxes in the fall of 1864, under the general revenue laws, the whole purpose of the enactment fails. The bonds were payable directly out of the Union Military fund by the Treasurer without any auditing thereof. They are notes of the State already audited when issued, and payable with interest in twelve months.

The error into which the respondent has fallen consists in confounding the terms "levy" and "assessment" as used in the 12th section. The "levy" and "assessment" are separate and distinct things. The "levy" of a tax is made by the Legislature either by general or special law. The Constitution contains no provision regulating this power. The tax may be levied upon an existing valuation or assessment; the tax is levied by the act immediately upon all property then in the State, and is to be entered upon the existing "assessment."

The "assessment" is merely a "listing of property" and valuation which may be made yearly, biennially, or at such longer periods as the Legislature may determine. In some of the States this "valuation" or "listing" is made every ten years. In this State the statute provides for an annual "listing" or "assessment." But when an immediate special tax is imposed without determining that it shall be upon a future assessment, it must be construed to be made upon the then existing "listing" or "assessment"—Bouv. Law Dic., "Assessment," "Levy."

Nor can this be called a retrospective act, for it can only operate upon the property—upon the party owning the property at the time the tax is levied—and the county courts are clothed with ample power to regulate mistakes. By act of February 20, 1865 (Sess. Acts 1865, p. 112), two special taxes were levied; one, a two mill tax, for the revenue fund was made upon the basis of the assessment made in September, 1864 (see § 1), and another, an income tax, was levied by the other four sections upon a new assessment to be made under the act. So by act of March 12, 1867 (Sess. Acts 1867, p. 157), two distinct taxes were levied upon the basis of an assessment already made, to-wit, in September, 1866. So also by act of December 20, 1866 (Acts 1866, pp. 93-4, § 4), a special tax was levied for the year 1866, upon the basis of an assessment then made, to-wit, September, 1865. All these instances go to prove that a tax may be levied by the Legislature upon the basis of an assessment already made

upon a new assessment when so provided ; but when there is no new assessment ordered or enacted, the then existing assessment is to be the basis for the first levy of such tax.

In this connection, it may be observed that the tax-book for 1863 was to be delivered to the collector for collection in July, 1863 ; so there was ample time given the clerk for entering the levy of this tax according to law.

*J. Williams*, for respondent.

I. A peremptory mandamus ought to be refused, because there was no law in force in the State of Missouri in 1863 authorizing the assessment and collection of a separate and special tax for military purposes.

(a) The revenue law of March 27, 1861, was in force and governed in the assessment of the revenue for the year 1863, the 10th section of the 2d article of the revenue act of 1861 (Sess. Acts 1860-61, p. 65) fixes the time for the assessment to commence on the 1st day of September ; hence the tax for 1863 was to be assessed on the 1st of September, 1862. The 41st section of the same article requires the assessor to make out the tax-book and return it to the clerk's office of the County Court on or before the 1st day of February in each year. The 42d section requires the County Court to sit as a court of appeals on the 3d Monday in February, to hear and determine all appeals from erroneous assessments, &c. The 46th section requires the County Court to hear all appeals from erroneous assessments, &c. The 47th section requires the clerk of the County Court to make out the tax-book as corrected and deliver it to the collector. The tax-book as corrected and adjusted by the court of appeals could not be altered, except in certain cases a tax might be altered before payment upon the complainant showing good cause upon oath for not having attended the court of appeals—§ 51, Art. 2, Sess. Acts 1860-61, p. 70.

(b) The record of the County Court shows that the court of appeals was held in Jefferson county at the time fixed by law, viz., 3d Monday in February, 1863 ; so the tax-book for

that year had passed out of the hands of the assessor, and also beyond the control of the County Court, before the "Act to provide means for the support and payment of the enrolled militia," &c., had become a law, for the act was not approved till March 9, 1863.

II. The circular of Wm. S. Mosley, auditor, dated June 15, 1863, directing the clerk of the County Court to make a supplemental tax-book for a special military tax, was a nullity. The auditor had no authority to require the clerk to make such a book; there is nothing in the revenue law of 1861 authorizing the clerk of the County Court to make out a supplemental tax-book or to levy a tax.

III. Sec. 12 of the "Act to provide means for the support of the militia," approved March 9, 1863, provided that the military tax "shall be levied, assessed and collected in the same manner as other taxes." This shows that the Legislature intended the act to operate prospectively and not retrospectively, for the Legislature knew that the tax-book had been made out by the assessor, and that the court of appeals was passed and the tax-book in the hands of the collector in every county in the State before the act for the assessment of the military tax was passed. If, then, the Legislature had intended that this military tax should be collected for 1863, they would have provided in the act for its assessment and collection. They failed to do this; therefore, to construe the act so as to require the military tax to be levied for 1863, would be to give it a retrospective operation. This is never to be done unless the intention of the Legislature is palpable—Bac. 224, 295; 1 Scam. 335; 3 A. K. Marsh, 138; 5 Mon. 129, 140; 7 John, 477; 3 Me. 333; 3 Eng. Law & Eq. 30.

IV. The 12th section of the act requiring the military tax to be collected, &c., is general in its terms. It says, "shall be assessed, &c., as other taxes"; it is therefore to be construed according to the course of the common law—6 Bac. Abr., tit. Stat. 383-4.

V. Again, as the act for the levy, &c., of the military tax

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(§ 12, "Act to provide for the assessment, levy, &c., of a military tax," approved March 9, 1863) does not provide for the collection of the tax, &c., for the year 1863, it cannot be so construed as to require the levy and collection for that year, for the reason that it is a tax law, is in derogation of the common law, and must be strictly construed and strictly pursued—Blackw. Tax Title, 86; Stierlein v. Daley, 37 Mo. 483.

HOLMES, Judge, delivered the opinion of the court.

The petition prays for a *mandamus* upon the clerk of the County Court of Jefferson county, directing him to make out a supplemental tax-book, in pursuance of the 75th section of the revenue act (Gen. Stat. 1866, ch. 12, § 75) for the levy and collection of the military tax in said county for the year 1863, which tax was omitted to be levied and collected at the proper time, under the provisions of the act entitled "An act to provide means for the payment and support of the Enrolled Militia" &c., approved March 9, 1863 (Reg. Sess. p. 25).

The return to the alternative writ admits the material facts, and the demurrer to the return raises the questions of law: First, whether this military tax was required by the act to be levied and collected for the year 1863, upon the assessment for that year? and second, if so, whether the failure to levy can now be remedied under existing laws?

We are very well satisfied that it was the proper effect and intention of the act of 1863, that the tax should be levied and collected for that year, upon the assessment which had already been completed, or was then in progress. The act took effect immediately. It required that this tax should be "levied, assessed and collected in the same manner as other taxes." No provision was made for any special assessment, and it is evident that it was supposed that the general revenue laws then in force would be ample for the purpose of enabling the public officers to carry the act into effect. Such seems to have been the contemporaneous construction. Nearly all the counties proceeded, under the instructions of the State auditor, to

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levy and collect the tax for the year 1863. Some few counties failed to make the levy. The fact that the tax-books for that year, in this county, had been adjusted before the court of appeals, and had passed out of the hands of the county court, before the passage of this act, may furnish an explanation of the reason why this tax was not levied and collected for that year. It amounts only to a failure to make the levy as the law required. Any other construction would do great injustice to the other counties which have paid this tax, and might result in serious inconvenience to the State. There is nothing in the terms of the act which imperatively demands a different construction; and there can be little doubt that such is the true intent and meaning of the law, and it must be held to be the proper construction.

It is equally clear that the general revenue act of 1866 (§ 75) makes the necessary provision for remedying this omission. It is objected that there would be great inequality and injustice in making the levy for the omitted tax of that year upon the basis of the present assessment in that county. This would be very true, if such were the necessary consequence; but the law does not require that to be done. This section expressly provides that "when, for any cause, there has been a failure to levy the proper rate of taxes, or any portion of them, in any county, for any year or years, the clerk for the time being shall make a supplemental tax-book for such year or years, when officially notified by the auditor," and that "such supplemental tax-book shall be made *upon the assessment for the time being*, the tax for each year to be in a separate book, and to be levied and collected at the proper time." It is obvious that *the assessment for the time being*, here spoken of, is intended to refer to the year or years in which there was a failure to levy and collect the tax, and means that the supplemental tax-book, in such case, shall be based upon the assessment for the year in which the tax was omitted, and not to any existing assessment. This construction would be in accordance with the reason and justice of the thing; it does no violence to the

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natural sense of words ; and there is scarcely room for doubt that such was the intention of the law.

We see no practical difficulty, nor any injustice in requiring the county to proceed in the levy and collection of this tax.

A peremptory *mandamus* will be ordered. Judge Wagner concurs ; Judge Fagg absent.

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STATE *ex rel.* H. A. SWIFT, Relator, *v.* TREASURER OF STATE OF MISSOURI, Respondent.

1. *Revenue—Civil Officer—Penitentiary—Salaries.*—Except where special provision is otherwise made by the statutes, all claims against the State must be paid to the party to whom the claim is due. The warden of the Penitentiary is not authorized to demand and collect the sums due by the State to persons employed by him ; his contract with them, when approved by the inspectors, determines the amount of the salaries such persons are to receive from the State for services rendered.
2. *Revenue—Treasurer—Warrants.*—It is the province of the Treasurer to see that all warrants presented to him are drawn against the proper fund ; and drawn in such manner as to make them, when paid, vouchers to show conclusively to whom and for what services the public moneys have been paid out.

*Petition for Mandamus.*

*Krum, Decker & Krum* with *H. A. Clover*, for relator.

I. Inasmuch as the statute devolves the duty upon the warden of the Penitentiary to appoint the "deputy warden and other officers and servants of the Penitentiary" with the approval of the inspectors, and that approval having been given and the services for which this warrant in question was drawn having been rendered, and proper proofs and vouchers having been furnished the Auditor, it was competent and lawful for the Auditor to aggregate the amounts and draw one warrant in favor of the warden as was done in this case—G. S. 1865, §§ 13 & 15, p. 873.

II. It appears that the warrant was drawn to pay employ-

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ees of the Penitentiary for services actually rendered under the direction of the warden with the approval of the inspectors, and the Auditor had in his possession proper proofs and vouchers thereof at the time he drew this warrant. The State is fully protected against any claim for the same services.

III. It is not the province of the Treasurer to review the action of the Auditor, in this or any other case, if the warrant of the latter is in due form, drawn against the proper fund, and appears on its face to be for the payment of officers or employees of the State whose pay is to come out of the fund against which the warrant is drawn.

IV. The warden is the proper officer to certify the performance of services of all subordinate employees under his supervision, and especially those employed by him.

*Isaac T. Wise*, for respondent.

I. The statute evidently contemplates that each warrant on the Treasurer to be valid must show the precise object of the draft, and to whom or for what the money is paid—G. S. 1865, p. 873, § 16, & p. 173 § 2.

II. The Auditor's power to draw does not make it binding on the Treasurer to pay—State ex rel. Long v. Auditor, 38 Mo. 87.

FAGG, Judge, delivered the opinion of the court.

The question to be determined in this case arises upon a demurrer to the petition of the relator. The facts stated in the petition are therefore to be taken as confessed. A writ of mandamus is asked commanding the respondent as State Treasurer to pay the relator the sum of \$7,831.80, that being the amount of a warrant by the State Auditor in favor of the relator as warden of the Penitentiary. This sum is alleged to be the aggregate amount of claims due and owing to the servants employed in the State Penitentiary on the first day of October, 1867. It is averred that the several claims of the servants aforesaid were filed and determined by agreement

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made with the warden of the Penitentiary and approved by the inspectors as required by law. The amount of these claims being ascertained and allowed by the Auditor, the warrant was drawn upon the treasury payable out of any money therein appropriated for the pay of civil officers.

Sec. 16, ch. 221, Gen. Stat. 1865, after enumerating the officers of the Penitentiary for whom specific salaries are fixed, together with the precise amount of each, provides as follows: "and the other officers and servants shall receive such salaries as shall be agreed on between them and the warden, subject to the approval of the inspectors; the whole to be paid quarterly out of the treasury, out of the fund appropriated for the pay of civil officers."

By the 13th section of the same chapter the "other officers and servants" spoken of are required to be appointed by the warden and shall hold their offices during his pleasure and that of the inspectors. There is no express provision to be found anywhere in the statutes authorizing the warden to receive and disburse the money due to the servants and employees under his control. The authority given him to fix the amount of their wages by agreement, subject to the approval of the inspectors, does not change the character of the claim. When the services are performed according to the contract, the amount due therefor at the end of the quarter is a claim against the State in favor of the servant, and should be paid to him just as a quarter's salary is paid to each officer whose salary is fixed and determined by the law itself. In other words the contract with the warden is the method fixed by law for determining the amount of the servant's salary. Upon a careful examination of the law regulating the State treasury, our opinion is that in no case, unless otherwise specifically directed by the statute, ought a claim against the State to be allowed or paid except to the party to whom it is due.

These servants do not perform services for the warden but for the State; their claim for such services is not against him but against the State. It is true that, in auditing such claims,

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there ought to be proper evidence of their correctness. The certificate of the warden as to his agreement with the servant, together with the amount of service actually rendered, might be very proper evidence to authorize the allowance of the claim; but we would not intimate, in the absence of any express provision of law to that effect, that it should be considered conclusive.

It is the province of the Treasurer to see that all warrants presented to him are drawn against the proper fund, and drawn in such manner as to make them, when paid, such vouchers as will show conclusively to whom and for what services the public moneys have been paid out by him. This discretion must always be exercised in a just and sound manner. Whenever it is sought to be exercised in an arbitrary or oppressive manner, the courts will always interpose their authority to prevent it.

Our opinion upon the case stated is that the payment of this warrant was properly withheld, and the peremptory writ of mandamus must be refused. The other judges concur.

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STATE *ex rel.* J. C. BRECKENRIDGE, Relator, *v.* JAMES COOK,  
Registering Officer, &c., Respondent.

1. *Elections—Registration—Voters.*—The statute (G. S. 1865, p. 908, § 18) has made no provision for the registration of persons before any special election, except in cases where they have become qualified voters since the preceding general registration. The throwing out of the vote of a whole election district by the court of appeals, because the officer making the registration was disqualified to act, does not give a party who was a qualified voter, and who was registered as such, the right to demand that he shall be entered as a qualified voter in preparing the lists of voters for a special election. The statute has made no provision for correcting such errors.
2. *Courts—Jurisdiction—Hard Cases.*—It is better that an individual should be temporarily deprived of his rights than that the courts should overstep the boundaries of established precedent and sound construction, and annihilate the line which separates the legislative from the judicial functions.

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*Petition for Mandamus.*

"John C. Breckenridge, your petitioner, respectfully shows to this court, that he is a voter residing in Union election district, Washington county, Missouri, and has subscribed and filed with the clerk of the County Court of said county the oath of loyalty prescribed by the Constitution; that he has been a volunteer soldier and officer, and served as such in the army of the United States from near the beginning to the close of the late war with the Rebels or Confederates, and was honorably discharged from the service of the United States; that at and prior to October, 1866, James J. Wilkinson had been appointed by the Governor of the State as supervisor of registration in and for said county, and duly qualified and acted as such, and as such officer he duly appointed Buel Atchinson, a resident of Breton district, officer of registration for Union election district on or previous to October, 1866; and that in October, 1866, in time and manner required by law, on due notice, the said Buel Atchinson, as such officer aforesaid, proceeded in said Union district to register the qualified voters; that your petitioner, together with some fifty or more loyal Union soldiers, took and subscribed the oath of loyalty, and did and performed all and every act required of them respectively to become registered voters in and for said district; and this petitioner says he was registered as a voter in said district, as were some fifty or more others, by said Atchinson, so acting as registering officer therein as aforesaid, and he is not aware of and never received notice of any objection made by any person or persons to his being a registered voter in said district. And your petitioner further says, that after he had been so registered as a qualified voter by said Atchinson in said district, and on the last day, and in the same afternoon of the last day of the meeting of the board of appeals in and for said county at Potosi, and without any notice thereof previously given to your petitioner, or any of the other voters so

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registered, the said board of appeals rejected and declared null and void the entire list of registered voters, including the register of your petitioner, on the sole ground that the said Buel Atchinson, register as aforesaid, was not at the time a resident of Union district, but was a resident of Breton, an adjoining district in same county. Your petitioner says he has not since had the opportunity to become a registered voter in said district, although he is now and has for the past five years been a resident and duly qualified to be registered as a voter in said district. Your petitioner further says, that at the general election held in said county in November, 1866, Mr. Moreau was elected supervisor of registration in and for said county, and has duly qualified and been commissioned as such, and that on the — day of October, 1867, there having been a special election ordered for representative in Congress in place of Hon. Thomas E. Noel, deceased, and there being a vacancy in the office of registration for said Union district, the said Moreau, as supervisor of registration, duly appointed James Cook, a resident and duly qualified voter, officer of registration in and for said district, and filed said appointment with the clerk of the County Court; and the said Cook has filed the required oath and entered upon the discharge of the duties of his office. And your petitioner further says, that one week's previous notice, in form and manner required by law in such cases for general registration, was given by said Moreau, as supervisor of registration, that a registration of voters would be taken and a session of the registering office for said Union district would be held in said district in October, &c., and a session of the board of appeals of said county would be held on the Saturday following. Your petitioner says that he has applied to said office of registration, and also to said supervisor of registration, and asked to have his name placed upon a list of registered voters, and to become a registered voter in and for said district, and that he has offered and is ready and willing to take and subscribe the oath of loyalty, and do and perform all other acts necessary and required

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to become a registered voter in said district ; but the said James Cook, registering officer as aforesaid, has refused and utterly refuses to permit your petitioner to become a registered qualified voter in said district. Wherefore your petitioner prays this court that a mandamus may issue directing and commanding said officer James Cook to register your petitioner as a voter in said district on your petitioner appearing before said officer and taking and subscribing the oath of loyalty, and otherwise satisfying said officer that your petitioner is and has always been a loyal person, and is a qualified voter in said district, and for such further and other order as the court may deem proper."

*G. I. Van Allen*, for relator.

Attorney-General, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The relator asks for a mandamus from this court to compel the registering officer of Union election district, in Washington county, to permit him to register. He states in his petition, substantially, that he is a duly qualified voter, and that he took and subscribed the oath of loyalty previous to the regular election in November, 1866, and was regularly registered as a voter, but that the court of appeals, composed of the supervisors of registration, threw out the vote of the entire election district in which he was registered, on the ground that the officer making the registration was disqualified to act ; that he has made application to again register, in order that he may be entitled to vote at the special election for member of Congress in his district at the ensuing election ordered by the Governor of the State, but that the registering officer has refused to permit him to register. The Attorney-General has filed a demurrer to the petition, and for objection states that the allegations fail to show that the petitioner has become a qualified voter since the general registry had in 1866, but on the contrary shows that he was a qualified voter at the time said registry was had.

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The decision of the whole case rests upon the 18th section of the law relating to registration. That section provides that for the purpose of keeping the list of qualified voters complete, the clerk of the County Court shall, fifteen days before any special election, cause to be delivered to the officer of registration of each election district the books of registration returned by said officer of registration, who shall immediately proceed to register the names of such persons as have become qualified voters after the closing of the registry, unless it appears that such person was restricted because sufficient time had not elapsed for his becoming a qualified voter, and that since such rejection sufficient time had elapsed. There is no provision whatever made for registering any persons, except such as have qualified since the closing of the last general registry. A person, therefore, who was duly entitled to registration and failed from any cause to be registered, cannot avail himself of the privilege when the lists are being completed in view of a special election. It seems that the law makes no provision, in case where the books are destroyed or they have been rendered ineffective for any reason, for making the registration anew. No new registry can be had till the next biennial election. There is undoubtedly a palpable defect in the law, a clear *casus omissus*; but this court cannot be appealed to, to amend and perfect laws by judicial legislation. This very case is one of great hardship and deprivation. Here is a citizen who fought in the armies of the country to preserve the government, who is a qualified voter according to law, and who has faithfully complied with all the prescribed forms of registration, and yet he is denied his privilege of exercising the elective franchise because the court of appeals and revision pronounced the book in which he was registered a nullity, and the law has failed to allow a new registration in such an instance. But it is better that he should be deprived of a right temporarily, than that this court should overstep the boundaries of established precedent and sound construction, and annihilate the line which separates judicial from legislative functions.

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State ex rel. Lawrence v. St. Louis Ct. Crim. Corr.

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"We are bound," says Mr. J. Buller, in an early case in the King's Bench, "to take the act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not"—*Jones v. Smart*, 1 T. R. 44, 52.

"A court of law" says Lord Abinger, "ought not to be influenced or governed by any notions of hardship; cases may require legislative interference, but judges cannot modify the rules of law"—*Rhodes v. Smithurst*, 4 Mees. & W. 63. To the same point, *Hall v. Franklin*, 3 Mees. & W. 259. "It is not for courts of justice, *proprio motu*, to provide for all the defects or mischief of imperfect legislation"—*Smith v. Ruez*, 2 Sumn. 354-5, per Story, J.

With the concurrence of the other judges, the mandamus will be refused.



STATE *ex rel.* SAMUEL C. LAWRENCE, Relator, *v.* THE JUDGE OF THE ST. LOUIS COURT OF CRIMINAL CORRECTION, Respondent.

1. *Courts—Criminal Practice—Exceptions—Appeals.*—The St. Louis Court of Criminal Correction is, by the statute creating it, always in session; but all appeals from any decision must be taken within three days after the trial, and bills of exceptions should be signed and filed before the appeal is taken. Where the counsel consent that time be granted to file bills of exceptions and take appeals, the consent should be entered of record.
2. *Mandamus—Courts.*—The Supreme Court will not grant a mandamus to an inferior court unless it appear that the court has omitted or refused to perform its duty.

*Petition for Mandamus.*

*Brown & Hoffman*, for relator.

*S. Voullaire* and *Theo. Sternberg*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This is an application for a *mandamus* upon the judge of

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State ex rel. Lawrence v. St. Louis Ct. Crim. Corr.

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the St. Louis Court of Criminal Correction to require him to allow and sign a bill of exceptions. The case is submitted upon a demurrer to the return.

It appears that, upon the trial of the relator in said court for a misdemeanor in office, a verdict and judgment were given against him, from which an appeal was granted. After the trial was over, the attorneys on either side entered into an agreement between themselves that the defendant's attorney should have ten days in which to prepare his bill of exceptions, to be submitted to the plaintiff's attorney for examination, and to be returned within six days thereafterwards. It does not appear that any exceptions were taken, allowed, and noted in writing, during the progress of the trial, nor that any consent to the signing and filing of a bill of exceptions, at any subsequent time, was entered of record. The bill of exceptions remained in the hands of the plaintiff's attorney about five months after it was submitted to him, and was never returned. After this lapse of time, the plaintiff's attorney presented to the judge a bill of exceptions prepared by himself, which was signed, and filed, and afterwards stricken off the records on motion of the opposite attorney, who thereupon drew up another bill, which the judge refused to sign for the reason that he did not remember the facts, and could not say of some of the exceptions contained whether they were true or not. This application is now made to this court for a *mandamus* to require him to sign this bill.

The Court of Criminal Correction is made a court of record; it is to be at all times open, and the proceedings are to be conducted in a summary manner; it is to be governed by the laws regulating proceedings and practice in criminal cases so far as the same may be applicable, but no written pleadings can be required of the defendant; and appeals may be allowed to the Supreme Court if applied for within three days after the rendition of judgment—Gen. Stat. 1866, p. 895. The court has no terms. The practice in criminal cases in relation to new trials and bills of exceptions is the

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same as in civil cases—*State v. Marshall*, 36 Mo. 403. It may be inferred that the same rules are to govern in the Court of Criminal Correction so far as they may be applicable to that court as it is organized under the statute creating it; but the consideration that there are no terms, that the proceedings are summary, and without pleadings on the part of the defendant, and that all appeals must be taken within three days after the trial, will necessarily make some difference in the application of these rules to the practice of that court. It has frequently been decided that exceptions must be taken during the progress of the trial or proceeding, and allowed and noted in writing at the time, though the formal bill of exceptions, which is to contain all the exceptions taken in one bill, may be drawn up and signed afterwards—*Consaul v. Lidell*, 7 Mo. 250; *Lane v. Kingsbury*, 11 Mo. 408. It is settled also that a bill of exceptions can be signed and filed at a subsequent term, or after the end of the term, only by consent of the parties, entered of record at the trial term, allowing it to be signed and filed at a subsequent period—*Ellis v. Andrews*, 25 Mo. 327; *Pomeroy v. Selmes*, 8 Mo. 727; *State v. O'Brien*, 21 Mo. 272. Under the general practice act, all appeals must be taken during the term. Under this special act, an appeal must be taken within three days after the trial. By the analogy and reason of the thing, we are of the opinion that the bill of exceptions should be signed and filed before the appeal is taken, unless a consent for further time be given and entered of record.

It does not appear that the court had any part in the arrangement of counsel for further time to prepare and file the bill of exceptions. The bill submitted not having been returned within the six days agreed on, the defendant's attorney should have required its return at once, and, if refused, should have immediately presented a bill to the judge. It was gross laches in him to allow the matter to rest for five months. At the end of nearly eight months, it could not reasonably be expected that the judge could remember the facts which occurred on the trial, without written notes,

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State v. Mullen et ux.

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of the exceptions taken, or be able to say whether the bill then presented to him were true or not. Aside from the consideration that the exceptions were not allowed and noted during the trial, nor any consent entered of record for the signing of a bill at any subsequent period (which alone would be sufficient reasons for refusing this application), the delay was such as to fully justify the action of the judge in refusing to sign a bill eight months afterwards, and no ground is left on which this court could properly interfere by granting a *mandamus*. The case does not show that the judge has omitted any manifest duty—Moses on Mand. 19.

The peremptory *mandamus* must be refused. The other judges concur.



STATE, Respondent, v. GEORGE MULLEN and MARY E. MULLEN  
Appellants.

*Criminal Practice—Supreme Court.*—Judgment affirmed, appellants failing to prosecute their appeal from a judgment imposing a fine.

*Appeal from St. Louis Court of Criminal Correction.*

J. P. Colcord, for respondent.

FAGG, Judge, delivered the opinion of the court.

On the 4th day of September, 1867, the appellants were tried upon a charge preferred against them in the St. Louis Court of Criminal Correction. Having been found guilty and adjudged to pay a fine, an appeal was taken to this court. The respondent now files a transcript of the record, accompanied by a motion asking that the judgment of the court below be affirmed. It appearing to the satisfaction of the court that these parties have taken no steps to prosecute their appeal, the judgment will be affirmed. The other judges concur.

STATE, Respondent, v. JAMES ADAMS, Appellant.

*Appeal from St. Louis Court of Criminal Correction.*

*J. P. Colcord*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This case is here upon a motion to affirm the judgment of the court below for failure to prosecute the appeal within the time prescribed by law. The transcript filed by the respondent shows that a final judgment was rendered against the appellant by the Court of Criminal Correction of St. Louis county on the 3d day of May, 1867. An appeal was granted on the same day, the necessary steps therefor having been duly taken. It appearing to the satisfaction of the court that the appellant has wholly failed to prosecute his appeal, the motion will be sustained and the judgment affirmed. The other judges concur.

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2. *Trespass—Damages.*—All persons who wrongfully contribute in any manner to the commission of a trespass, or who, after the same has been committed, assent to it, are responsible as principals, and each is liable to the extent of the injury done.—*Allred v. Bray*, 484.
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2. *Settlements—Appeals.*—The annual settlements of the executor or administrator are not settlements from the allowance of which an appeal can be taken to the Circuit Court. Such settlements are not final nor conclusive as judgments against parties interested in the estate. (See *Picot v. Biddle's Adm'r*, 35 Mo. 22.)—*Id.*
3. *Insurance—Policy on Life—Representatives.*—In a policy of life insurance, providing that in case of death the sum insured shall be paid to the "heirs or representatives" of the party assured, the money will be payable to the heirs or next of kin, if it appear from the context that the object of the assured was to make provision for his family, and not that the money should go to his executors or administrators to be administered as ordinary assets of his estate.—*Loos' Guard. v. Jno. Hancock Mut. Life Ins. Co.*, 538.

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2. *Partnership—Action.*—Where one of several partners executes a note in his own name for money borrowed, no action can be maintained against the firm for the consideration of the note, although the money may have been borrowed for the firm and applied to partnership purposes. The money received upon the note will be treated as an advance to the firm by the partner executing the note, and not as a loan to the partnership. (See S. C. 35 Mo. 428.)—*Farmers' Bk. of Mo. v. Bayless et als.*, 274.

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1. *Legislature—Officer.*—The officers of a municipal corporation are civil officers within the meaning of the provisions of the Constitution, Art. IV., sec. 15. A member of the General Assembly, therefore, cannot be appointed to an office under such corporation, which has been created or the emoluments of which have been increased during the term for which

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he was elected. A member of the Legislature receives a compensation for his services as a civil officer, and holds an office of profit as well as honor and is therefore prohibited from holding office as a member of the board of water commissioners for the City of St. Louis, by the provisions of the act creating the board—§ 5, Acts 1866-7, p. 185.—*State ex rel. Att'y-Gen'l v. Vallé*, 29.

2. *Executive—Commission—Officer—Sheriff*.—The Constitution, Art. V., sec. 25, requires the Governor to commission all officers when not otherwise provided by law. The statute, G. S. 1865, ch. 16, has made no provision for issuing a commission to the person elected to the office of sheriff, and therefore he cannot assume the duties of the office until he is duly commissioned by the Governor.—*State ex rel. Att'y-Gen'l v. Pool*, 32.
3. *Statutes—Construction—Evidence*.—By the Constitution, Art. IV., § 32, such portions of a law enacted by the General Assembly as are not expressed in the title of the act are void. The title of the act of February 1, 1867, provides for appeals in contested election cases; the subject of sec. 8 of said act giving the right of appeal in all other civil cases is not expressed in the title, and is therefore inoperative, except in cases of contested elections.—*State ex rel. Hixon v. Lafayette Co. Ct.*, 39.
4. *Supreme Court—Jurisdiction*.—The General Assembly can confer original jurisdiction upon the Supreme Court only in the cases specified in the Constitution; in all other cases its jurisdiction must be appellate. The act, approved March 11, 1867 (Acts 1867, p. 9), authorizing the Supreme Court to determine both the law and the facts in relation to the amount due Emory S. Foster, the public printer, is void, as it involves no question of constitutional law, and does not show a solemn occasion calling upon the court to give its judicial opinion to the Executive or either branch of the General Assembly.—*Foster v. State*, 61.
5. *State—United States—Sovereignty*.—The States, when they entered the Union, retained all their original power and sovereignty, except so much as they expressly surrendered to the Federal Government, or they were expressly prohibited from exercising: subject to these exceptions, they are independent commonwealths, and are the exclusive judges of what is just and proper for their own safety, welfare, and happiness. Prior to the adoption of the Federal Constitution the respective States possessed unlimited and unrestricted sovereignty, and retained the same ever afterward, except so far as they granted certain powers to the General Government, or prohibited themselves from doing certain acts. Every State reserved to itself the exclusive right of regulating its own internal government and police.—*Blair v. Ridgely et al.*, 63.
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7. *People—Constitution—Elections—Voters*.—In common language, when we speak of the people, we mean all the inhabitants of a State; but

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this is not so when we speak of the people in a political sense. In speaking of the people as a body politic, we speak only of that portion of the inhabitants who are entrusted with the political power. *The people*, for political purposes, must be synonymous with qualified voters. If the power to regulate the internal government and police of a State reside in the people, then it is their peculiar and exclusive province to say and determine what shall constitute any inhabitant a qualified voter. Upon the exercise of this power by the people of a State there is no restriction or restraint imposed by the Constitution of the United States, for there is not to be found in that instrument a single sentence, paragraph, or word, which gives the National Government power over the qualifications of voters in any of the States; and the direct opposite is affirmed in the article providing that "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively or to the people."—*Id.*

8. *Elective Franchise—Voters—Sovereignty.*—Outside of society, and disconnected with political society, no person has or can exercise the elective franchise as a natural right, and he only receives it upon entering into the social compact subject to such qualifications as may be prescribed by the State or body politic. The State of Missouri having sovereign power to regulate its own internal government, and to prescribe the qualifications which shall authorize any inhabitant to exercise the elective franchise therein, the oath prescribed in Art. II., §§ 2 & 6, of the Constitution as one of the qualifications for voting, does not violate any of the provisions of the Constitution of the United States.—*Id.*
9. *Ordinance—Indemnity and Oblivion—Military Power.*—The ordinance of the Convention of March 17, 1865, incorporated in the Constitution, Art. XI., § 34, which forbids the prosecution of all civil actions or criminal proceedings against any one for acts done after January 1, 1861, in pursuance of military orders or in virtue of military authority, does not conflict with the provisions of the Constitution of the United States. Although retrospective in its operations, it is not a bill of attainder, does not violate the obligations of a contract, and does not divest any settled right of property.—*Drehman v. Stifel*, 184.
10. *Action—Forcible Entry and Detainer—Vested Rights.*—A right to recover damages in an action of forcible entry and detainer is not a vested right in property, and is not protected by the Constitution of the United States against the action of a State in its sovereign capacity when acting in Convention, or in virtue of its sovereign powers.—*Drehman v. Stifel*, 184.
11. *State—Sovereignty.*—The people of a State in their sovereign capacity, when founding a civil government, have power to determine how much of his rights and liberties the citizen shall surrender for the public good, and there is no limitation to this power of the State except the prohibitions of the Constitution of the United States.—*Id.*
12. *Retrospective Laws—State.*—The Constitution of the United States does not prohibit a State from enacting retrospective laws or ordinances of a civil nature which take away a right of action, or divest rights invested in an individual, if these laws do not impair the obligation of a contract nor

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divest settled rights of property. The ordinance of the Convention of March 17, 1865, incorporated in Art. XI., § 31, of the Constitution, is an act of indemnity and oblivion and pardon; of indemnity as far as it affects civil actions, and oblivion as it affects criminal proceedings; and is not inconsistent with the Bill of Rights.—*Id.*

13. *Property taken for Public Uses—Military Authority.*—For property taken for public use, or for property destroyed by military authority, the Government and not the officer is responsible.—*Id.*

14. *Ordinance—Evidence—Jury.*—The provisions of the ordinance of 17th March, 1865, and Art. XI., sec. 31, of the Constitution, have the effect of declaring as a presumption of law and a rule of evidence, that when the military authority or military orders are shown, that the emergency or necessity which justified the acts done shall be presumed as a matter of law. It changes the rules of evidence, and makes that a justification and a defence which would not have been such before without further proof. The military necessity only is thus conclusively proved; but the question whether the military authority or orders existed in fact, or whether the acts complained of were done by military authority or under military orders, or were the acts of the individual himself in his private capacity, or were an abuse of power, or a perversion of orders for private ends or malicious purposes, still remain open for the determination of a jury.—*Id.*

15. *Office—Qualifications.*—The power of the State to declare in its Constitution, or, when that is silent, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as the power to fix the qualifications of voters. (*Ante Blair v. Ridgely et al.*, 68.)—*State ex rel. Attorney-General v. Woodson*, 227.

16. *Jurisdiction—Circuit Courts—Elections—Office.*—The power granted to the Circuit Courts to relieve parties from disabilities imposed by article second of the Constitution confers a special and limited jurisdiction, and the record of the proceedings must therefore show all the facts which give the jurisdiction: and if this be not done, the judgment of the court will be void. The record must show that the applicant is a resident of the county; that after committing the acts of disloyalty he voluntarily entered the service of the United States, and was duly sworn and mustered into service under regular military authority; that he was honorably discharged, and that after his discharge he demeaned himself as a faithful and loyal citizen. Forces organized for home protection were not forces in the service of the United States. HOLMES, J., dissenting upon the latter point, citing *ante* *Drehman v. Stifel*, p. 184; and holding, also, that the word "sympathy," in art. 2, § 3, of the Constitution, had a peculiar meaning arising out of the history of affairs in this State, and that by it was meant not the feeling of kindness or affection for some individuals engaged in rebellion, but a sympathy with the cause of the rebellion manifested by acts which would be of a treasonable character.—*Id.*

17. *Executive—Commission—Officer—Sheriff.*—Before a person elected to the office can assume the duties of sheriff he must be commissioned by the Governor. (See *ante State ex rel. Att'y-Gen'l v. Pool*, 32.)—*State ex rel. Attorney-General v. Morrison*, 238.

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18. *Officer—Commission—Elections.*—In issuing a commission under the provisions of the Constitution, the Governor is not precluded from looking beyond the certificate of election, and may determine for himself who was the person duly and legally elected to the office, and the commission when issued is presumptive evidence that the person holding it is lawfully entitled to the office.—State ex rel. Jackson v. Howard Co. Ct., 247.
19. *Ordinance—Officer—Circuit Attorneys.*—The Constitution when it went into effect, repealed all ordinances and laws inconsistent therewith. Vacancies in office occurring after the present Constitution went into effect must be filled in the manner pointed out by that instrument; and a vacancy occurring in the office of assistant circuit attorney for the Eighth Judicial Circuit, could not be filled by the appointment of the Governor after a successor was duly elected, commissioned and qualified. (State ex rel. Attorney-General v. McAdoo, 36 Mo. 453.) — State ex rel. Kreiter v. Straat, 58.
20. *Test Oaths—Clergymen—Attorneys—Bills of Attainder—Ex post facto Laws.*—The Supreme Court of the United States having decided, in the case of Cummings, 4 Wall. 277, that the *oath of loyalty* prescribed by the Constitution of this State, art. 2, §§ 3, 6, 7, 9 & 14, in reference to clergymen, and, so far as relating to past acts, to be a bill of pains and penalties within the prohibition of the Constitution of the United States, and therefore unconstitutional and void, the court accepts the authority of that decision as establishing the rule in similar cases. The decision in the case of Ex parte Garland, 4 Wall. 333, applies the same rule to the case of attorneys.
- Per HOLMES, J. The persons affected by the test oath were entitled to the benefit of the legal presumption of innocence, in conformity with the great principles of public law which constitute the law of nations, as recognized by the Constitution of the United States. Those who were citizens, and became rebels and criminals in law, are by the amnesty proclaimed restored to their former estate and condition of citizenship, and must thenceforth be presumed innocent until convicted of some new crime; and are entitled to the common benefit of the laws and government, and to nothing more: they owe obedience to the laws, and are entitled to the protection of the law. For their opinions and feelings, when not put forth in any new acts of resistance, they are not responsible to the civil state. The right of trial by jury, and the presumption of innocence involved therein, is protected by the Federal Constitution, and cannot be infringed by a State. Natural rights become civil rights when defined, declared and secured by the laws of the civil state, and when properly secured they constitute civil liberty. The rights of life, liberty and property (that is, personal security, personal locomotion or freedom from arrest, and private property), when they exist, are protected by the Federal Bill of Rights from being taken away in any criminal case without due process of law. The courts must determine the question, whether a legislative enactment is in its effect and intention a legislative sentence of punishment, and the intention must be discovered from a true construction of the law and from the effects produced by it. The effects produced must be presumed to have been within the intention of the legislative body enacting the law. The exclusions and disabilities

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of the oath of loyalty refer directly to the enumerated acts, and it is assumed that these persons have done some one or more of the acts, of which some are manifestly crimes, and all are dealt with in the same way as if they were of like nature; the truth of which they are obliged to confess by the impossibility of their taking the oath, thus effectually changing the rules of evidence and subverting the presumption of innocence retrospectively in every individual case, contrary to the law of nations and the national right of trial by jury in criminal cases. It must be assumed that the legislative body intended to do what is actually done, and that would seem to be, essentially, nothing else than a legislative sentence of punishment for past conduct as criminal; and so it may be concluded that the act itself assumes judicial magistracy, weighs the offence and the proofs, decides upon the necessity and fitness of the penal judgment, assumes the guilt, ascertains the persons, and declares the punishment.—Murphy and Glover Test Oath Cases, 339.

21. *Oath of Loyalty—Attender—Teachers*.—The decision in the case of *State v. Murphy*, ante p. 339, applies to the cases of persons acting as professors and teachers in educational institutions.—*State v. Heighland*, 388.
22. *General Assembly—County Courts—Vacating Ordinance*.—By the Constitution, art. 6, sec. 1, the General Assembly was authorized to establish inferior judicial tribunals, and under this power it could reorganize the inferior courts then existing, and to that extent could abrogate the vacating ordinance of 1865. The provision of the statute, G. S. 1865, ch. 137, § 3, declaring vacant the office of justices of the county courts, and providing for the election of new justices, was constitutional.—*State ex rel. Davis v. Mann*, 395.
23. *Bills of Credit—Mortgage*.—A mortgage given to secure a debt, the consideration of which was Loan-Office certificates, is void. See *Craig v. State of Missouri*, 4 Pet. (U. S.) 410.—*Moreau et al. v. Detchemendy et als.*, 431.
24. *Laws—Construction—Railroad Corporations—Court*.—The provision of the Constitution, Art. 11, § 14, Gen. Stat. 1865, p. 43, is a limitation upon the future power of the General Assembly, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted. The law does not favor the repeal of statutes by implication. In the construction of statutes, all acts passed on the same subject *in pari materia* must be taken and construed together, and made to stand if they can be reconciled. The provision of the charter of the Missouri and Mississippi Railroad Company (Sess. Acts 1865, p. 86, § 13) authorizing the county courts of any county to subscribe for the stock of said company and to issue bonds therefor, &c., was not repealed by the Constitution, Art. XI, § 14.—*State ex rel. Mo. & Miss. R.R. Co. v. Macon Co. Ct.*, 453.
25. *Jury—Crimes—Misdemeanors*.—Upon the trial of parties indicted for capital crimes and felonies, the prisoner cannot waive his constitutional right to a trial and verdict by a jury of twelve good and competent jurors. In cases of misdemeanors, where the penalty is a fine merely, he may waive his right and may accept the verdict of less than twelve jurors, or submit to a trial by the court.—*State v. Mansfield*, 470.

## CONTRACTS.

1. *Setton—Voluntary Assumpsit.*—No action can be maintained for moneys expended or for services rendered to the defendant, except in pursuance of a contract express or implied between the parties. No person can make another his debtor without the consent of the party benefitted; there must be a previous request express or implied, or an assent or sanction given after the money is paid or the act done.—*Allen's Adm'r v. Richmond College*, 302.
2. *Evidence—Writing.*—Where a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part only of the contract is reduced to writing, the matter thus left out of the writing may be supplied by parol evidence.—*Moss v. Green*, 389.
3. *Consideration—Promise.*—A promise is a sufficient consideration for a promise where there is an absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement.—*Id.*
4. *Promise—Parent and Child.*—Where a child after coming of age resides with a parent and renders services, it will be a question for the jury to decide, taking into consideration the nature and degree of the relationship, the circumstances in life of the parties and other matters which may affect it, whether there was an implied contract for compensation. The statements of the parent are admissible in evidence for the plaintiff in connection with other circumstances.—*Hart v. Hart's Adm'r*, 441.
5. *Bailment—Carriers—Agent.*—A delivery to a servant or duly authorized agent of a common carrier, who is in the habit of receiving packages, is a sufficient delivery to the carrier; and the acts of the agent within the usual scope of his employment will bind the employer regardless of any private instructions, unless the party delivering the package knew of the instructions. Where a passenger delivered his trunk and a piece of carpeting to the baggage master of a passenger railroad train and received a check for his trunk, but was told that no check was necessary for the carpet as it would go safely—*held*, that the railroad company was liable for the loss of the carpet, although by the printed rules of the company the baggage master was forbidden to receive as passenger's baggage articles of merchandise.—*Minter v. Pacific R.R.*, 503.
6. *Assignment—Notice—Payments.*—After the debtor has received notice of the assignment of a chose in action, any payments made by him to the assignor, either directly or upon garnishments, are made at his peril.—*Leahey v. Dugdale's Adm'r*, 517.
7. *Services—Damages.*—In actions upon contracts for services rendered, the compensation agreed upon is *prima facie* the measure of damages when the defendant refuses to permit a performance on the part of the plaintiff.—*Steinberg v. Gebhardt*, 519.
8. *Bond—Assignment—Cause of Action.*—Any party to a chose in action originating in contract, may in equity assign his several interest in the contract without affecting the rights of the parties interested with him. A bond was given to A. and by him assigned to B. and C., who instituted suit against the obligors; C. assigned his interest in the bond and suit to the obligors: *Held*, that B. had no cause of action against C., and that the assignment of

CONTRACTS (*continued*).

B. was equivalent to a payment to him by the obligors of the amount due him, and that B. still retained his right to recover of the obligors the sum due to himself. (R. C. 1855, p. 1217, § 1, & p. 322, § 4.)—McPike v. McPherson, 521.

9. *Sale—Broker—Services*.—A broker employed to make a sale under an agreement for a commission is entitled to payment when he makes the sale in good faith according to instructions, and the principal cannot relieve himself from his liability by refusing to consummate the sale, or by any voluntary act of his own disabling him from performance.—Bailey v. Chapman, 536.

## CONVEYANCES.

See LANDS AND LAND TITLES. EJECTMENT.

1. *Sheriff's Deed—Acknowledgment*.—Where the entry of the acknowledgment endorsed upon the deed executed by the sheriff is regular and in proper form, the error of the clerk in making his entry of record will not invalidate or affect the deed. The law imposes a duty of making the statutory entries on the clerk as the officer of the court, but over him the purchaser has no control.—Scruggs v. Scruggs et al., 242.
2. *Sheriff's Deed—Seal*.—An instrument, purporting to be a deed executed by a sheriff conveying land sold under a judgment, to which no seal is attached nor scrawl affixed, is inoperative as a conveyance. (See Moreau et al. v. Branham et als., 27 Mo. 351.)—Moreau et al. v. Detchemendy et als., 431.
3. *Trustee's Sale—Purchaser—Notice*.—A purchaser at a trustee's sale will not be affected by any previous agreements made between the creditor and debtor, unless he had notice of such agreement before his purchase.—Powers v. Kueckhoff, 425.

## CORPORATIONS.

See CONSTITUTION, 24.

1. *Powers—Members—Estoppel*.—A corporation cannot be organized nor act without the limits of the jurisdiction of the State creating it. All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the State granting the charter, are wholly void; but a subscriber to the stock of a corporation thus illegally organized, who has given his note for the amount subscribed, may by his acts be estopped from denying the legal existence of the corporation, when sued by a *bona fide* endorsee for value before maturity.—Camp v. Byrne et al., 525.
2. *Dissolution—Assets—Equity*.—When a corporation is dissolved, a court of equity will lay hold of the assets for the purpose of applying them to the payment of creditors, as against others than *bona fide* creditors and purchasers.—Hill et al. v. Fogget al., 563.
3. *Dissolution—Trust*.—A sale by a corporation of its property, in good faith and for a valuable consideration, does not amount to a dissolution of the corporation, nor make the property sold subject to a trust for the benefit of creditors in the hands of such purchaser.—*Id.*

CORPORATIONS (*continued*).

4. *Practice—Pleadings—Negligence—Railroads.*—A petition by a railroad company charging that the animals of defendant unlawfully and by reason of the negligence of defendant entered upon the track of the road, and thereby plaintiff was injured, shows a good cause of action; plaintiff is not required to set forth the evidence in his pleadings, nor to set out the facts which show negligence in the defendant. — *Hannibal & St. Jo. R.R. Co. v. Kenney*, 271.
5. *Inclosures—Damages—Negligence—Railroads.*—By the law of this State the owner of animals is not bound to confine his stock within his own inclosures, and he is guilty of no negligence in not confining them; but although he is not bound to fence them in, he may be guilty of such wilfulness or negligence in regard to his animals as to render himself liable to a railroad company for damages caused by their being upon the track.—*Id.*

## COURTS.

See CONSTITUTION, 22.

1. *Jurisdiction—Agency.*—In the removal of the public buildings of a county, the County Court acts in an administrative capacity as agent of the county; and all persons dealing with it while thus acting are bound to know the law conferring the authority, and must see that it is followed.—*State ex rel. West et als. v. Clark Co. Ct. et als.*, 44.
2. *Prohibition—Jurisdiction—Process.*—The writ of prohibition is issued to inferior courts to prevent the wrongful assumption or excess of jurisdiction. It will not lie to restrain the performance of ministerial acts, such as collecting taxes, locating county seats, and the like. The county courts, in locating or removing county seats, act in an administrative and not in a judicial capacity, and the Supreme Court will not issue the writ of prohibition to restrain their action however mistaken it be.—*Id.*
3. *Officer—Misdemeanor in Office—Clerks.*—It is the duty of the justices of the County Court to know their own power and jurisdiction, and not the duty of the clerk to inform them; he is bound to obey the directions of the justices sitting as a court and acting upon matters coming within their general jurisdiction, and to enter such orders as they may make while they continue in office; he is not responsible for their errors or mistakes of law, nor for any official misconduct on their part, and the entry of orders made by them is no violation of his duty although the orders be illegal. The charge of misdemeanor in office preferred against the clerk of a court, under the statute, must be confined to his official action. To establish the charge, the conduct of the officer must be shown to have been wilful or corrupt; error in judgment merely, or ignorance or mistake of the law, is not enough, unless it be so gross as to show him to be entirely unfit for the office, and to render his tenure of office dangerous to the community.—*State ex rel. Att'y-Gen'l v. Hixon*, 210.
4. *Sessions—Jurisdiction.*—The meeting of the judges to hold a session of the court in vacation, or on a day to which they have have not adjourned, is illegal, and the action of the judges is invalid.—*Id.*
5. *Mandamus—Jurisdiction—Ministerial Acts.*—The writ of *mandamus* lies either to compel the performance of a ministerial act, or is addressed to sub-

COURTS (*continued*).

ordinate judicial tribunals requiring them to exercise their judicial functions and give judgment in cases before them. It will not lie to compel an inferior tribunal to give a particular judgment nor to reverse a decision already made; its office being to prevent a failure of justice from delay or refusal to act.—*State ex rel. Adamson v. Lafayette Co. Ct.*, 221.

6. *County Courts—Jurisdiction—Ministerial Acts—Offices—Collector—Revenue.*—In approving of the bond of the sheriff as collector of the State and county revenue, the justices of the County Court act in a ministerial, not in a judicial capacity. Their discretion is confined to an examination of the sufficiency of the security offered, and that must be a sound legal discretion, not capricious, arbitrary, nor oppressive.—*Id.*
7. *Constitution—Jurisdiction—Circuit Courts—Elections—Office.*—The power granted to the Circuit Courts to relieve parties from disabilities imposed by art. 2 of the Constitution confers a special and limited jurisdiction, and the record of the proceedings must therefore show all the facts which give the jurisdiction: and if this be not done, the judgment of the court will be void. The record must show that the applicant is a resident of the county; that after committing the acts of disloyalty he voluntarily entered the service of the United States, and was duly sworn and mustered into service under regular military authority; that he was honorably discharged, and that after his discharge he demeaned himself as a faithful and loyal citizen. Forces organized for home protection were not forces in the service of the United States. HOLMES, J., dissenting upon the latter point, citing *ante* *Drehman v. Stifel*, p. 184; and holding, also, that the word "sympathy," in art. 2, § 3, of the Constitution, had a peculiar meaning arising out of the history of affairs in this State, and that by it was meant not the feeling of kindness or affection for some individuals engaged in rebellion, but a sympathy with the cause of the rebellion manifested by acts which would be of a treasonable character.—*State ex rel. Att'y-Gen'l v. Woodson*, 227.
8. *Jurisdiction—Duties, Ministerial and Judicial.*—The judges of the County Court in approving the bond of the sheriff as collector of the revenue act in a ministerial capacity, having authority only to exercise a reasonable discretion in passing upon the sufficiency of the security offered. (*Ante* *State ex rel. Adamson v. Lafayette Co. Ct.*, 221.)—*State ex rel. Jackson v. Howard Co. Ct.*, 247.
9. *Mandamus—Supreme Court—Jurisdiction.*—The Supreme Court will not in the first instance direct a County Court to approve a bond tendered by a party claiming to hold the office of sheriff and collector of the revenue, the County Court not having officially passed upon the sufficiency of the bond; and if the alternative writ be so framed as peremptorily to require such approval, the peremptory mandamus will be refused. The alternative writ should be so framed as to require the County Court to pass upon the sufficiency of the bond.—*Id.*
10. *Supreme Court—District Court—Practice—Error and Appeals.*—The judgment of the District Court reversing the decision of the Circuit Court may be reviewed upon appeal or writ of error by the Supreme Court. The judgment of the District Court is a final judgment as far as that court is concerned.—*Strouse v. Drennan et als.*, 289.

COURTS (*continued*).

11. *Sheriff—Collector—Officer—County Court.*—None of the acts required by the statutes to be performed by a party in order to qualify him to exercise the functions of the office of sheriff, depend upon the approval of the County Court. It is immaterial as far as the right of the sheriff elect to exercise the duties of his office is concerned, whether his bond be approved by the Circuit Court within fifteen days after he receives the certificate of election or not; the time is immaterial if the bond be properly approved—*State ex rel., &c. v. Churchill, ante 41; State ex rel., &c. v. Howard Cb. Ct., ante 247.* The County Court, when the sheriff elect presents his bond as collector of the revenue, cannot inquire whether his bond as sheriff has been approved by the Circuit Court; it must recognize his commission issued by the Governor as conclusive of his right to the office.—*State ex rel. Adamson v. Lafayette Co. Ct., 545.*
12. *County Court—Jurisdiction—Duties, Ministerial and Judicial.*—The duties of the County Court, in passing upon the bond of the sheriff as collector of the revenue, are partly judicial and partly ministerial in their nature. The court has a discretion as to the sufficiency of the bond offered for their approval, which must be exercised in a lawful manner upon the facts presented, and the Supreme Court will exercise a superintending control over that discretion, so far as to compel the County Court to proceed according to a sound and just discretion, and to prevent the exercise of it in an unjust and arbitrary manner. To refuse to hear any testimony, or to pass upon the sufficiency of the securities offered, is not exercising a sound and legal discretion. (*State ex rel., &c. v. Lafayette Co. Ct., ante 221.*)—*Id.*
13. *Revenue—Collector's Bond—County Court.*—The County Court is not prohibited by the statute from requiring of the collector of the revenue, at any time when the public interest demands, additional bond and security, allowing him reasonable time to comply with the order of the court; and if reasonable time be not given, and no good cause be shown to the contrary, the presumption will be that the court has acted in an arbitrary and unjust manner. A copy from the assessment books showing the several amounts at which the securities in the collector's bond are assessed, will not be conclusive upon the amount of property owned by any individual.—*Id.*

## D

## DAMAGES.

See CORPORATIONS, 4, 5. PRACTICE. ACTION, 1.

1. *Inclosures—Negligence—Railroad Corporations.*—By the law of this State the owner of animals is not bound to confine his stock within his own inclosures, and he is guilty of no negligence in not confining them; but although he is not bound to fence them in, he may be guilty of such wilfulness or negligence in regard to his animals as to render himself liable to a railroad company for damages caused by their being upon the track.—*Han. & St. Jo. R.R. Co. v. Kenney, 271.*
2. *Trespass—Action.*—All persons who wrongfully contribute in any manner to the commission of a trespass, or who, after the same has been committed, assent to it, are responsible as principals, and each is liable to the extent of the injury done.—*Allred v. Bray, 484.*

DAMAGES (*continued*).

3. *Practice—Trial—Trespass—Evidence—Action.*—In ascertaining the liability of a party sued in an action of trespass for taking goods, committed by several persons, it is only necessary to show that the defendant participated in the wrong done; the amount of property taken by him, if he took any, is wholly immaterial.—*Id.*
4. *Practice—Trial—Verdict—Excessive Damages.*—In cases where nothing appears upon the record to justify the conclusion that there was anything corrupt or improper in the amount of damages found by a jury, the Supreme Court will not interfere with the verdict even though it may seem to be too large upon the facts proved.—*Id.*
5. *Trespass.*—In an action of trespass for breaking open the store of the plaintiff and taking and carrying away his goods, the mere value of the goods taken is not the measure of damages. The plaintiff is entitled to compensation for the injury done.—*Id.*
6. *Contract—Services.*—In actions upon contracts for services rendered, the compensation agreed upon is *prima facie* the measure of damages when the defendant refuses to permit a performance on the part of the plaintiff.—*Steinberg v. Gebhardt*, 519.

## E

## EJECTMENT.

## See CONVEYANCES. LAND AND LAND TITLES. LIMITATIONS.

1. *Practice—Equity—Fraudulent Conveyance.*—In a bill to set aside a deed as fraudulent as to creditors, the plaintiff cannot sue for the recovery of the possession of the land. A bill in equity is not the proper remedy for the recovery of the possession of real estate, as there is an adequate remedy at law. When a decree is entered setting aside the conveyance as fraudulent, the plaintiff can then sue in ejectment for the recovery of the possession. In an action for the recovery of the possession of land, the defendant is entitled to a trial by jury. In a bill to set aside a conveyance as fraudulent as against a purchaser at sheriff's sale, the purchaser is not entitled to a decree against the fraudulent grantee vesting the title in the plaintiff; for if the conveyance was fraudulent, the grantee took no title as against the creditor.—*Peyton v. Rose*, 257.
2. *Practice—Joinder of Actions—Partition.*—A cause of action in ejectment cannot be united with a cause of action for partition of the premises sued for.—*Gott v. Powell et al.*, 416.
3. *Practice—Partition.*—An ejectment and partition cannot be united in the same count.—*Moreau et al. v. Detchemendy et als.*, 431.
4. *Lands and Land Titles—Outstanding Title—Mortgage.*—A mortgage more than twenty years old cannot be set up as an outstanding title to defeat an action of ejectment, without proof of possession under the mortgage or of the present existence of the mortgage debt. (S. C. 18 Mo. 522, P. 2.)—*Id.*
5. *Lands and Land Titles—Conveyance—Tax Deed.*—The mere production of a deed from the Auditor of the State for land sold for taxes, in 1834, is insufficient to establish a title under the statutes relating to the sale of lands for taxes.—*Id.*

## ELECTIONS.

See CONSTITUTION, 7, 8, 16, 17, 18, 19.

1. *Officer—Bond.*—The provisions of the statute, G. S. 1865, ch. 38, § 5, requiring the county treasurer to give bond within ten days after his appointment or election, are merely directory. Time is not essential to the delivery of the bond; and if the County Court accept and approve the bond, it cannot at a subsequent date set aside its proceedings, annul the commission, and declare the office vacant. — State ex rel. Attorney-General v. Churchill, 41.
2. *Counties—Removal of County Seats.*—The statute of 1865 (Gen. Stat. 1865, chap. 36) repealed the provisions of the statute of 1855 (R. C. 1855, p. 515) in relation to the removal of the seats of justice in the counties. The action of the County Court upon the petition filed for the removal of the county seat must be had under the law in force at the time the court acts. Under the law of 1865, two-thirds of the legally registered voters must vote for the removal to authorize the County Court to remove the seat of justice.—State ex rel. West et als. v. Clark Co. Ct. et als., 44.
3. *Registration — Voters — Error.*—The statute (G. S. 1865, p. 908, § 18) has made no provision for the registration of persons before any special election, except in cases where they have become qualified voters since the preceding general registration. The throwing out of the vote of a whole election district by the court of appeals, because the officer making the registration was disqualified to act, does not give a party who was a qualified voter, and who was registered as such, the right to demand that he shall be entered as a qualified voter in preparing the lists of voters for a special election. The statute has made no provision for correcting such errors. — State ex rel. Breckenridge v. Cook, 593.

## EQUITY.

See EJECTMENT, 1. BILLS AND NOTES, 1. CORPORATIONS, 2.

1. *Injunction—Practice—Remedy at Law.*—An injunction will not be granted when the injury is susceptible of a perfect pecuniary compensation, and for which a party can obtain adequate satisfaction in the ordinary course of law.—Burgess et als. v. Kattleman et als., 480.
2. *Judgment—Record—Estoppel—Fraud.*—A party who has been duly served with process, and against whom judgment has been rendered for want of proper defence, cannot invoke the subsequent interposition of a court of equity to set aside the judgment on the ground that he was not a citizen or resident of the State, and that by fraudulent misrepresentations he had been induced to come within the jurisdiction, so that process might be served upon him. The objection should have been taken by appearing in the original suit and moving to set aside the service of process as procured by fraud.—Marsh's Adm'r v. Bast, 493.

## ESTOPPEL.

See JUDGMENTS. LANDLORD AND TENANT.

1. *Partition — Judgment — Landlord and Tenant — Conveyances.*—A judgment in partition estops the parties to the suit and all persons claiming in privity

ESTOPPEL (*continued*).

- with them. The deed made by the sheriff under an order of sale in a suit in partition is the act of the parties themselves, and the purchaser at such sale is to be treated as a grantee within the meaning of the statute. (G. S. 1865, ch. 187, §§ 36 & 40.)—*Pentz v. Kuester*, 447.
2. *Landlord and Tenant—Unlawful Detainer.*—Under the present statutes of this State, a tenant when sued by his lessor in unlawful detainer, may show by way of defence that the landlord has parted with the title, and that as tenant he has attorned to the purchaser or assignee (G. S. 1865, ch. 187, §§ 36 & 40); but the tenant cannot set up an outstanding title, or title paramount to that of the landlord or his assigns.—*Id.*
3. *Judgment—Record—Equity—Fraud.*—A party who has been duly served with process, and against whom judgment has been rendered for want of proper defence, cannot invoke the subsequent interposition of a court of equity to set aside the judgment on the ground that he was not a citizen or resident of the State, and that by fraudulent misrepresentations he had been induced to come within the jurisdiction, so that process might be served upon him. The objection should have been taken by appearing in the original suit and moving to set aside the service of process as procured by fraud.—*Marsh's Adm'r v. Bast*, 493.
4. *Corporations—Powers—Members.*—A corporation cannot be organized nor act without the limits of the jurisdiction of the State creating it. All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the State granting the charter, are wholly void; but a subscriber to the stock of a corporation thus illegally organized, who has given his note for the amount subscribed, may by his acts be estopped from denying the legal existence of the corporation, when sued by a *bona fide* endorsee for value before maturity.—*Camp v. Byrne et al.*, 525.
5. *Judgment—Security—Evidence.*—Where judgment has been rendered against a principal and his security in a bond, and the security upon satisfying the judgment sues his principal for money paid to his use, the principal is estopped from alleging illegality or want of consideration in the bond.—*Pitts v. Fugate's Adm'r*, 405.

## EVIDENCE.

See CONSTITUTION, 24.

1. *Statutes—Construction.*—When the mind of the Legislature has been turned to the details of a subject and it has acted upon it, a subsequent statute in general terms, or touching the subject in a general manner, and not expressly contradicting the original act, will not be construed as intended to affect the more particular or positive previous provisions, unless it be absolutely necessary so to do in order to give any meaning to the words of the later statute. The law does not favor a repeal of statutes by implication.—*State ex rel. Kellogg v. Treasurer*, 16.
2. *Statutes—Construction.*—Every act of the Legislature must be held to be prospective in its operation, unless a different effect is clearly to be gathered from its terms.—*State ex rel. Sup't Pub. Schools v. Auditor*, 25.

EVIDENCE (*continued*).

3. *Constitution—Statutes—Construction.*—By the Constitution, Art. IV., § 32, such portions of a law enacted by the General Assembly as are not expressed in the title of the act are void. The title of the act of February 1, 1867, provides for appeals in contested election cases; the subject of sec. 8 of said act giving the right of appeal in all other civil cases is not expressed in the title, and is therefore inoperative, except in cases of contested elections.—*State ex rel. Hixon v. Lafayette Co. Ct.*, 39.
4. *Constitution—Ordinance.*—The provisions of the ordinance of March 17, 1865, and Art. XI., § 31, of the Constitution, have the effect of declaring as a presumption of law and a rule of evidence, that when the military authority or military orders are shown, that the emergency or necessity which justified the acts done shall be presumed as a matter of law. It changes the rules of evidence, and makes that a justification and a defence which would not have been such before without further proof. The military necessity only is thus conclusively proved; but the question whether the military authority or orders existed in fact, or whether the acts complained of were done by military authority or under military orders, or were the acts of the individual himself in his private capacity, or were an abuse of power, or a perversion of orders for private ends or malicious purposes, still remain open for the determination of a jury.—*Drehman v. Stifel*, 184.
5. *Lands and Land Titles—Railroad Corporations.*—Under the act of Congress of June 10, 1852, granting lands to the State of Missouri for the construction of the roads therein named, and the statute of the State of 20th September, 1852, transferring such grant to the Hannibal and St. Joseph Railroad Company, no title to the *even* numbered sections within six miles of the road passed to the corporation until the plats of the location of the roads were filed in the office of the Secretary of State, and in the offices of the recorders of deeds in the counties in which the lands were located, as required by the statute of the State approved Sept. 20, 1852, § 7—see *Baker v. Gee*, 1 Wal. (U. S.) 338; *Pacific R.R. v. Lindell's Heirs*, 39 Mo. 329.—The act of Congress of June 10, 1852, made no provision for any kind of documentary evidence to be issued by the General Land Office, by which the location, boundaries and identity of the particular tracts granted within the six-mile limit were to be designated and proved; the public sectional surveys showing the even numbered sections within the six-mile limit, although admissible in evidence, are insufficient for that purpose. The certified list under the act of Congress of August 3, 1854, is evidence to show what lands passed by the grant; but if the lands embraced in such lists are not of the character contemplated by the act of Congress, or are not such as were intended to be granted thereby, then such certified lists can have no effect as evidence.—*Hann. & St. Jo. R.R. Co. v. Smith*, 310.
6. *Lands and Land Titles—Swamp Lands—Railroad Corporations—Reservation.*—The act of Congress of September 28, 1850, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," operated as a reservation upon the grant of lands made to the State of Missouri for the construction of the railroads described in the act of Congress of June 10, 1852; and in a suit of ejectment brought by the railroad corporation claiming title to lands under said act of June 10, 1852, parol

EVIDENCE (*continued*).

evidence is admissible to prove that the land sued for was "swamp and overflowed lands, made thereby unfit for cultivation," so as to bring such land within the terms of the grant or reservation made by the act of September 28, 1850, although the lists and plats to be made by the Secretary of the Interior, provided for in said act, had not been made and transmitted to the Governor, nor patents issued. Such parol evidence is not admissible to prove title in defendant, but is admissible for the purpose of rebutting and invalidating the effect of the lists issued under the act of Congress of June 10, 1852, and August 3, 1854.—*Id.*

7. *Contract—Writing.*—Where a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part only of the contract is reduced to writing, the matter thus left out of the writing may be supplied by parol evidence.—*Moss v. Green*, 389.

8. *Witnesses—Parties—Husband and Wife.*—In an action by surviving partners upon a *quantum meruit*, the answer alleging a special contract made with the deceased partner, the defendant is not a competent witness under the statute (G. S. 1865, p. 586, § 1) to prove a special contract made by himself with the deceased partner. Where the wife acted as agent for her husband in making a contract, she is a competent witness to prove the terms of the contract, although the party with whom the contract was made had deceased—G. S. 1865, p. 586, § 5. The provisions of sec. 5 are not controlled or modified by those of § 1, ch. 144, G. S. 1865.—*Stanton et al. v. Ryan*, 510.

## EXECUTIONS.

See EJECTMENT, 1. CONVEYANCES, 1, 2.

*Claim of Property—St. Louis County—Officer—Bond.*—Under the provisions of the acts "concerning the duties of sheriff and marshal in St. Louis county," &c. (Sess. Acts 1855, p. 464; Sess. Acts 1858-9, p. 439), the bond, taken by the officer to secure jointly claimants filing several claims for distinct portions of the property levied on, is not void so as to authorize an action against the officer for breach of duty in not taking good and sufficient indemnification bonds. Although the bond be taken for the joint benefit of several claimants, each claimant of property can maintain his separate action upon the bond to recover the amount to which he is entitled, and evidence outside of the bond will be competent to show what property was claimed by each. The bond, although defective in not following the requisitions of the statute, is not void.—*State to use Daggett v. Leutzinger et als.*, 498.

## F

## FORCIBLE ENTRY AND DETAINER.

See CONSTITUTION, 10.

1. *Practice.*—If the original forcible entry and detainer be justifiable, a suit for subsequent unlawful detainer cannot be maintained without a previous demand in writing for the possession of the premises and a refusal to deliver possession.—*Drehman v. Stifel*, 184.

**FORCIBLE ENTRY AND DETAINER** (*continued*).

2. *Landlord and Tenant—Estoppel.*—Under the present statutes of this State, a tenant when sued by his lessor in unlawful detainer, may show by way of defence that the landlord has parted with the title, and that as tenant he has attorned to the purchaser or assignee (G. S. 1855, ch. 187, §§ 36 & 40); but the tenant cannot set up an outstanding title, or title paramount to that of the landlord or his assigns.—*Pentz v. Kuester*, 447.

**FRAUD AND FRAUDULENT CONVEYANCES.**

*Goods and Chattels—Possession by Vendor.*—As to creditors and subsequent purchasers in good faith, the presumption of fraud, raised by the continued possession of goods and chattels by the vendor after sale, will be conclusive unless it be made to appear to the jury on the part of the person claiming under such sale, that the same was made in good faith and without any intent to defraud creditors or subsequent purchasers. When the fact is shown that there was no actual and continued change of possession, the burden of proving the good faith of the sale rests upon the claimant. (R. C. 1855, p. 805, § 10.)—*Hartman v. Vogel*, 570.

## G

**GUARDIAN AND WARD.**

*Administration—Sales by Guardian—County and Probate Courts—Jurisdiction.*—Under the statute relating to guardians and curators (R. C. 1845, ch. 73, p. 551, § 22), and the amendatory act of March 3, 1851 (Sess. Acts, p. 217), the County Court has no jurisdiction to order the real estate of the minor to be sold for his support, but only for his proper education. Where the petition filed by the guardian and the order of sale made by the court show that the sale was made for the education as well as the support of the ward, the jurisdiction of the court will be sustained and the sale will not be held void for want of jurisdiction in the court. The act of March 3, 1851, provided that sales of lands by guardians should be advertised and conducted in the manner provided for sales of real estate of decedents by executors and administrators. Where it appeared that the sale of the ward's real estate was made by the guardian without an appraisement, and that the report of sale was confirmed at the same term at which the sale was made—*Held*, that the provisions of the statute were not complied with, and that no title passed to the purchaser at the sale by the guardian's deed. County and Probate Courts are courts of limited jurisdiction, and in sales made under their authority it must appear that the provisions of the statute have been complied with, as the same liberal intendment is not extended to their acts as to those of courts of general jurisdiction. It is the duty of a purchaser buying real estate sold by the authority of courts, to look to the order of the court and see whether there is authority to sell, and if so, what are the conditions and restrictions incident to its exercise; he must see that the terms on which the power to sell depends have been complied with; when this is done, his title will not be vitiated by anything which takes place afterwards. Petition for rehearing filed and overruled.—*Strous v. Drennan et als.*, 289.

GUARDIAN AND WARD (*continued*).

2. *Partition—Practice—Guardian ad litem—Infants—Process—Judgment.*—Until an infant be brought into court by proper service of process upon himself or his guardian, a court has no authority to appoint a guardian *ad litem* under the Partition Act of 1845—R. C. 1845, p. 765. A judgment of partition entered against infant defendants upon the appearance of a guardian *ad litem* appointed by the court without any service of process, is void. (*Hite v. Thompson*, 18 Mo. 461, commented upon and explained.)—*Shaw et al. by Guardian v. Gregoire*, 407.

## H

## HUSBAND AND WIFE.

See EVIDENCE. WITNESSES.

## I

## INCLOSURES.

See DAMAGES.

## INJUNCTION.

See EQUITY. PRACTICE.

## J

## JUDGMENT.

1. *Estoppel—Partition—Landlord and Tenant—Conveyances.*—A judgment in partition estops the parties to the suit and all persons claiming in privity with them. The deed made by the sheriff under an order of sale in a suit in partition is the act of the parties themselves, and the purchaser at such sale is to be treated as a grantee within the meaning of the statute. (*G. S.* 1865, ch. 187, §§ 36 & 40.)—*Pentz v. Kuester*, 447.
2. *Record—Estoppel—Equity—Fraud.*—A party who has been duly served with process, and against whom judgment has been rendered for want of proper defence, cannot invoke the subsequent interposition of a court of equity to set aside the judgment on the ground that he was not a citizen or resident of the State, and that by fraudulent misrepresentations he had been induced to come within the jurisdiction, so that process might be served upon him. The objection should have been taken by appearing in the original suit and moving to set aside the service of process procured by fraud.—*Marsh's Adm'r v. Bast*, 493.
3. *Security—Evidence—Estoppel.*—Where judgment has been rendered against a principal and his security in a bond, and the security upon satisfying the judgment sues his principal for money paid to his use, the principal is estopped from alleging illegality or want of consideration in the bond.—*Pitts v. Fugate's Adm'r*, 405.
4. *Practice—Error—Reversal—Restitution.*—The restitution to which a party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary. If the adversary party has ac-

JUDGMENT (*continued*).

quired title to land or goods by virtue of his execution, if the judgment be reversed, his title to the land or goods fails, and the land or goods must be restored in specie—not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral right before the reversal. *Gott v. Powell et al.*, 416.

5. *Practice—Military Service.*—By the provisions of the statutes of 15th of May, 1861 (Sess. Acts 1861, p. 46), and of 17th March, 1863 (Sess. Acts 1863, p. 39), a prohibition is placed upon the plaintiff in bringing suit against any person engaged in the military service of this State or of the United States, which precludes him from deriving any benefit from his suit except to prevent the bar of the statute of limitations. If the plaintiff bring his suit, procure constructive service of process, and proceed to take final judgment upon a default, the judgment will, upon proper motion and proof, be set aside at a subsequent term, and the execution issued thereon quashed. (*Bruns et al. v. Crawford et al.*, 34 Mo. 330; *Donnell v. Stephens*, 35 Mo. 441.)—*Piper v. Aldrich*, 421.
6. *Practice—Assignment—Change of Interest.*—Where one of the plaintiffs in a suit assigns his interest in the cause of action to the defendants, the remaining plaintiffs may proceed with the suit, and recover the judgment to which they are entitled. The court may give judgment for or against one or more of the plaintiffs, and determine the ultimate rights of the parties on either side. (R. C. 1855, p. 1278, § 2.)—*McPike v. McPherson*, 521.

## JURISDICTION.

1. *Constitution—Supreme Court.*—The General Assembly can confer original jurisdiction upon the Supreme Court only in the cases specified in the Constitution; in all other cases its jurisdiction must be appellate. The act, approved March 11, 1867 (Acts 1867, p. 9), authorizing the Supreme Court to determine both the law and the facts in relation to the amount due Emory S. Foster, the public printer, is void, as it involves no question of constitutional law, and does not show a solemn occasion calling upon the court to give its judicial opinion to the Executive or either branch of the General Assembly.—*Foster v. State*, 61.
2. *Constitution—Circuit Courts—Elections—Office.*—The power granted to the Circuit Courts to relieve parties from disabilities imposed by article second of the Constitution confers a special and limited jurisdiction, and the record of the proceedings must therefore show all the facts which give the jurisdiction: and if this be not done, the judgment of the court will be void. The record must show that the applicant is a resident of the county; that after committing the acts of disloyalty he voluntarily entered the service of the United States, and was duly sworn and mustered into service under regular military authority; that he was honorably discharged, and that after his discharge he demeaned himself as a faithful and loyal citizen. Forces organized for home protection were not forces in the service of the United States. *HOLMES, J.*, dissenting upon the latter point, citing *ante Drehman v. Stifel*, p. 184; and holding, also, that the word "sympathy," in art. 2, § 3, of the Constitution, had a peculiar meaning arising out of the

JURISDICTION (*continued*).

- history of affairs in this State, and that by it was meant not the feeling of kindness or affection for some individuals engaged in rebellion, but a sympathy with the cause of the rebellion manifested by acts which would be of a treasonable character.—State ex rel. Att'y-Gen'l v. Woodson, 227.
3. *Courts — Agency.* — In the removal of the public buildings of a county, the County Court acts in an administrative capacity as agent of the county; and all persons dealing with it while thus acting are bound to know the law conferring the authority, and must see that it is followed.—State ex rel. West et als. v. Clark Co. Ct. et als., 44.
  4. *Prohibition — Courts — Process.* — The writ of prohibition is issued to inferior courts to prevent the wrongful assumption or excess of jurisdiction. It will not lie to restrain the performance of ministerial acts, such as collecting taxes, locating county seats, and the like. The county courts, in locating or removing county seats, act in an administrative and not in a judicial capacity, and the Supreme Court will not issue the writ of prohibition to restrain their action however mistaken it be.—*Id.*
  5. *Courts — Sessions.* — The meeting of the judges to hold a session of the court in vacation, or on a day to which they have have not adjourned, is illegal, and the action of the judges is invalid.—State ex rel. Att'y-Gen'l v. Hixon, 210.
  6. *County Courts — Ministerial Acts — Offices — Collector — Revenue.* — In approving of the bond of the sheriff as collector of the State and county revenue, the justices of the County Court act in a ministerial, not in a judicial capacity. Their discretion is confined to an examination of the sufficiency of the security offered, and that must be a sound legal discretion, not capricious, arbitrary, nor oppressive.—State ex rel. Adamson v. Lafayette Co. Ct., 221.
  7. *Courts — Duties, Ministerial and Judicial.* — The judges of the County Court in approving the bond of the sheriff as collector of the revenue act in a ministerial capacity, having authority only to exercise a reasonable discretion in passing upon the sufficiency of the security offered. (*Ante* State ex rel. Adamson v. Lafayette Co. Ct., 221.)—State ex rel. Jackson v. Howard Co. Ct., 247.
  8. *County Court — Duties, Ministerial and Judicial — Sheriff.* — The duties of the County Court, in passing upon the bond of the sheriff as collector of the revenue, are partly judicial and partly ministerial in their nature. The court has a discretion as to the sufficiency of the bond offered for their approval, which must be exercised in a lawful manner upon the facts presented, and the Supreme Court will exercise a superintending control over that discretion, so far as to compel the County Court to proceed according to a sound and just discretion, and to prevent the exercise of it in an unjust and arbitrary manner. To refuse to hear any testimony, or to pass upon the sufficiency of the securities offered, is not exercising a sound and legal discretion. (State ex rel. &c. v. Lafayette Co. Ct., *ante* 221.)—State ex rel. Adamson v. Lafayette Co. Ct., 545.
  9. *Courts — Hard Cases.* — It is better that an individual should be temporarily deprived of his rights than that the courts should overstep the boundaries

**JURISDICTION** (*continued*).

of established precedent and sound construction, and annihilate the line which separates the judicial from the legislative functions.—State ex rel. Breckenridge v. Cook, 593.

**JURY.**

See CONSTITUTION.

**L****LANDLORD AND TENANT.**

See CONSTITUTION, 10.

1. *Estoppel — Partition — Judgment — Conveyances.* — A judgment in partition estops the parties to the suit and all persons claiming in privity with them. The deed made by the sheriff under an order of sale in a suit in partition is the act of the parties themselves, and the purchaser at such sale is to be treated as a grantee within the meaning of the statute. (G. S. 1865, ch. 187, §§ 36 & 40.)—Pentz v. Kuester, 447.
2. *Unlawful Detainer — Estoppel.* — Under the present statutes of this State, a tenant when sued by his lessor in unlawful detainer, may show by way of defence that the landlord has parted with the title, and that as tenant he has attorned to the purchaser or assignee (G. S. 1865, ch. 187, §§ 36 & 40); but the tenant cannot set up an outstanding title, or title paramount to that of the landlord or his assigns.—*Id.*
3. *Lien—Rent—Lease—Trees.*—The lien of a landlord reserved in a lease of land rented for the purpose of cutting staves, heading, timber, cord-wood, &c., to be sold by the lessee, is not equivalent to that of a chattel mortgage, so as to preclude the lessee from disposing of the timber, &c., cut prior to the re-entry of the landlord for condition broken. Upon the re-entry, the lien will attach to whatever may be left or found in the tenant's possession on the premises.—Burgess et als. v. Kattleman et als., 480.

**LANDS AND LAND TITLES.**

See EJECTMENT, 4, 5.

1. *Railroad Corporations—Evidence.* — Under the act of Congress of the 10th of June, 1852, granting lands to the State of Missouri for the construction of the roads therein named, and the statute of the State of 20th September, 1852, transferring such grant to the Hannibal and St. Joseph Railroad Company, no title to the even numbered sections within six miles of the road passed to the corporation until the plats of the location of the roads were filed in the office of the Secretary of State, and in the offices of the recorders of deeds in the counties in which the lands were located, as required by the statute of the State approved Sept. 20, 1852, § 7—see Baker v. Gee, 1 Wal. (U. S.) 338; Pacific R.R. v. Lindell's Heirs, 39 Mo. 329.—The act of Congress of June 10, 1852, made no provision for any kind of documentary evidence to be issued by the General Land Office, by which the location, boundaries and identity of the particular tracts granted within the six-mile limit were to be designated and proved; the public sectional surveys showing the even numbered sections within the six-mile limit, al-

LANDS AND LAND TITLES (*continued*).

though admissible in evidence, are insufficient for that purpose. The certified list under the act of Congress of August 3, 1854, is evidence to show what lands passed by the grant; but if the lands embraced in such lists are not of the character contemplated by the act of Congress, or are not such as were intended to be granted thereby, then such certified lists can have no effect as evidence.—*Hann. & St. Jo. R.R. Co. v. Smith*, 310.

2. *Swamp Lands—Railroad Corporations—Reservation—Evidence.*—The act of Congress of the 28th of September, 1850, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," operated as a reservation upon the grant of lands made to the State of Missouri for the construction of the railroads described in the act of Congress of June 10, 1852; and in a suit of ejectment brought by the railroad corporation claiming title to lands under said act of June 10, 1852, parol evidence is admissible to prove that the land sued for was "swamp and overflowed lands, made thereby unfit for cultivation," so as to bring such land within the terms of the grant or reservation made by the act of September 28, 1850, although the lists and plats to be made by the Secretary of the Interior, provided for in said act, had not been made and transmitted to the Governor, nor patents issued. Such parol evidence is not admissible to prove title in defendant, but is admissible for the purpose of rebutting and invalidating the effect of the lists issued under the act of Congress of June 10, 1852, and August 3, 1854.—*Id.*
3. *Confirmation—Old Board—Enurement—Conveyances.*—Under a confirmation made by the old Board of Commissioners, the title passes to the person presenting the claim and to whom the certificate issues, and does not enure to the benefit of an assignee under an assignment made prior to the filing of the claim.—*Downing v. Deis et al.*, 542.

## LIMITATIONS.

1. *Adverse Possession.*—An actual, continued, adverse and open possession of the premises sued for, with an assertion of title for more than ten years prior to the commencement of an action of ejectment, bars the plaintiff's title.—*Scruggs v. Scruggs et al.*, 242.
2. *New Promise—Action.*—A promise to pay a debt barred by the statute of limitations does not give a new cause of action, and the suit is properly brought upon the original contract. Under the statute, the promise to take the case out of the statute must be in writing, must acknowledge the debt from which the law will imply the promise, or promise payment. Where the plaintiff, to remove the bar, proves a general acknowledgment of indebtedness in writing, the burden of proof is upon the defendant to show that it related to a different demand from that in controversy.—*Carr's Adm'r v. Hurlbut's Adm'r*, 264.

## M

## MANDAMUS.

1. *Practice—Officer—Clerk.*—The object of a mandamus is to compel the performance of an act. Under the provisions of G. S. 1865, ch. 34, § 18, it is

MANDAMUS (*continued*).

the duty of the court to prefer charges against the clerk if he has been guilty of misdemeanor in office, and it may in the meantime suspend him from office; and if it neglect this duty, a mandamus may be awarded to compel its performance. A return to the charges preferred should state the time, to show that the charges were preferred before application was made for the writ.—*State ex rel. Hixon v. Lafayette Co. Ct.*, 38.

2. *Jurisdiction—Ministerial Acts.*—The writ of *mandamus* lies either to compel the performance of a ministerial act, or is addressed to subordinate judicial tribunals requiring them to exercise their judicial functions and give judgment in cases before them. It will not lie to compel an inferior tribunal to give a particular judgment nor to reverse a decision already made; its office being to prevent a failure of justice from delay or refusal to act.—*State ex rel. Adamson v. Lafayette Co. Ct.*, 221.

3. *Supreme Court—Jurisdiction.*—The Supreme Court will not in the first instance direct a County Court to approve a bond tendered by a party claiming to hold the office of sheriff and collector of the revenue, the County Court not having officially passed upon the sufficiency of the bond; and if the alternative writ be so framed as peremptorily to require such approval, the peremptory mandamus will be refused. The alternative writ should be so framed as to require the County Court to pass upon the sufficiency of the bond.—*State ex rel. Jackson v. Howard Co. Ct.*, 247.

4. *Practice—New Trials.*—The Supreme Court will review the discretion of the inferior court in granting a new trial, only upon a proper application, by *mandamus*. In granting a new trial, the court is not necessarily confined to the grounds enumerated in the statute.—*Leahey v. Dugdale's Adm'r*, 517.

5. *Practice—Return.*—The issues should be made up on the return to the alternative writ; and for the purpose of reaching the legal questions involved, it will be assumed, in the Supreme Court, that the necessary steps in pleading have been taken, whenever it is apparent from the facts presented that such questions properly arise.—*State ex rel. Adamson v. Lafayette Co. Ct.*, 545.

6. *Courts.*—The Supreme Court will not grant a mandamus to an inferior court unless it appear that the court has omitted or refused to perform its duty.—*State ex rel. Lawrence v. St. Louis Ct. Crim. Cor.*, 598.

## MORTGAGES AND DEEDS OF TRUST.

1. *Deeds of Trust—Trustees' Sales—Notice.*—Sales by trustees under the powers contained in deeds of trust executed to secure an indebtedness must be made with precision. The notice given by the trustee should contain such facts as reasonably to apprise the public of the place, time and terms of sale, and of the property to be sold; but mere omissions and inaccuracies in these respects not calculated to mislead, and working no prejudice, will not be regarded. A notice stating that the property would be sold for cash, at the court-house door in the town of Hillsboro, but omitting to name the county and that the property would be sold to the highest bidder at public vendue—*held*, sufficient.—*Powers v. Kueckhoff*, 425.

MORTGAGES AND DEEDS OF TRUST (*continued*).

2. *Trustee's Sale—Purchaser—Notice.*—A purchaser at a trustee's sale will not be affected by any previous agreements made between the creditor and debtor, unless he had notice of such agreement before his purchase.—*Powers v. Kueckhoff*, 425.

## O

## OFFICER.

See COURTS, 11, 12, 13. CONSTITUTION, 15, 18, 19. EXECUTION, 1. ELECTIONS.

1. *Revenue—Expenditures—Auditor—Accounts.*—By the statute (Gen. Stat. 1865, ch. 10) the Auditor is made the general accountant of the State as to all claims payable out of the treasury, excepting only such claims as are expressly required by law to be audited and settled by other persons. A claim for costs for services rendered by the clerk of the St. Louis Criminal Court, although duly certified by the judge of that court and the circuit attorney, does not come within the class of excepted cases, and the Auditor may go behind the certificate and refuse to audit the claim. (See *Morgan v. Buffington*, 21 Mo. 549; *State ex rel. McMurtry v. Auditor*, 37 Mo. 176.) *State ex rel. Daily v. Auditor*, 13.
2. *Constitution—Legislature.*—The officers of a municipal corporation are civil officers within the meaning of the provisions of the Constitution, Art. IV., sec. 15. A member of the General Assembly, therefore, cannot be appointed to an office under such corporation, which has been created or the emoluments of which have been increased during the term for which he was elected. A member of the Legislature receives a compensation for his services as a civil officer, and holds an office of profit as well as honor, and is therefore prohibited from holding office as a member of the board of water commissioners for the City of St. Louis, by the provisions of the act creating the board—§ 5, Acts 1866-7, p. 185.—*State ex rel. Att'y-Gen'l v. Vallé*, 29.
3. *Statutes—Construction—Evidence.*—By the Constitution, Art. IV., § 32, such portions of a law enacted by the General Assembly as are not expressed in the title of the act are void. The title of the act of February 1, 1867, provides for appeals in contested election cases; the subject of sec. 8 of said act giving the right of appeal in all other civil cases is not expressed in the title, and is therefore inoperative, except in cases of contested elections.—*State ex rel. Hixon v. Lafayette Co. Ct.*, 39.
4. *Constitution—Executive—Commission—Sheriff.*—Before a person elected to the office can assume the duties of sheriff he must be commissioned by the Governor. (See *ante State ex rel. Att'y-Gen'l v. Pool*, 32.)—*State ex rel. Attorney-General v. Morrison*, 238.
5. *Executive—Commission—Sheriff.*—The Constitution, Art. V., § 25, requires the Governor to commission all officers when not otherwise provided by law. The statute (G. S. 1865, ch. 16) has made no provision for issuing a commission to the person elected to the office of sheriff, and therefore he cannot assume the duties of the office until he is duly commissioned by the Governor.—*State ex rel. Att'y-Gen'l v. Pool*, 32.

OFFICER (*continued*).

6. *Clerks—Practice.*—When a clerk of a court is suspended from office under the provisions of the statute, G. S. 1865, ch. 24, § 18, upon charges preferred of misdemeanor in office, no appeal lies from the action of the judges. Sec. 8 of the act of February 1, 1867, is inoperative to give such right of appeal.—State ex rel. Hixon v. Lafayette Co. Ct., 39.
7. *Mandamus—Practice—Clerk.*—The object of a mandamus is to compel the performance of an act. Under the provisions of G. S. 1865, ch. 34, § 18, it is the duty of the court to prefer charges against the clerk if he has been guilty of misdemeanor in office, and it may in the meantime suspend him from office; and if it neglect this duty, a mandamus may be awarded to compel its performance. A return to the charges preferred should state the time, to show that the charges were preferred before application was made for the writ.—State ex rel. Hixon v. Lafayette Co. Ct., 38.
8. *Schools—School Commissioner of St. Louis County.*—The Revised Statutes of 1865 (G. S. 1865, ch. 46) repealed the statute R. C. 1855, ch. 143, and also the provisions of the statute, Acts 1857, p. 407, relating to the appointment and term of office of School Commissioner for St. Louis county. The ordinance of 1861, abolishing the office of School Commissioner in all the counties except St. Louis, did not make the previous statutes locally applicable only to St. Louis county, so that they were kept in force by the revision of 1865.—State ex rel. Tice v. St. Louis Co. Ct., 52.
9. *Constitution—Ordinance—Circuit Attorneys.*—The Constitution when it went into effect, repealed all ordinances and laws inconsistent therewith. Vacancies in office occurring after the present Constitution went into effect must be filled in the manner pointed out by that instrument; and a vacancy occurring in the office of assistant circuit attorney for the Eighth Judicial Circuit, could not be filled by the appointment of the Governor after a successor was duly elected, commissioned and qualified. (State ex rel. Attorney-General v. McAdoo, 36 Mo. 453.)—State ex rel. Kreiter v. Straat, 58.
10. *Tenure of Office—When Authority ceases.*—When officers are elected or appointed to hold office until their successors are duly elected, commissioned and qualified, their authority does not cease until they are notified in some way that their successors are duly qualified, and their acts as a court *de facto* will be deemed valid until such notice is given.—State ex rel. Attorney-General v. Hixon, 210.
11. *Clerks, Duties of.*—The duties of the clerk of a County Court are essentially ministerial; so far as the entering of the orders of the court are concerned, or the performance of any other act which may be legally or properly required of him by the court, he is without discretion; he has no power to judge of the matters to be done, and must obey the mandates of the tribunal whose officer he is.—State ex rel. Attorney-General v. Bowen, 217.
12. *Clerks of Courts—Misdemeanors in Office.*—The refusal of the clerk of a County Court to produce the books and papers in his office before the court for its inspection and action thereon, when thereto required, is a misdemeanor in office.—*Id.*

## P

## PARTITION.

1. *Practice—Joinder of Actions—Ejectment.*—A cause of action in ejectment cannot be united with a cause of action for partition of the premises sued for.—*Gott v. Powell et al.*, 416.
2. *Practice—Ejectment.*—An ejectment and partition cannot be united in the same count.—*Moreau et al. v. Detchemendy et als.*, 431.
3. *Practice—Guardian ad litem—Infants—Process—Judgment.*—Until an infant be brought into court by proper service of process upon himself or his guardian, a court has no authority to appoint a guardian *ad litem* under the Partition Act of 1845—*R. C. 1845*, p. 765. A judgment of partition entered against infant defendants upon the appearance of a guardian *ad litem* appointed by the court without any service of process, is void. (*Hite v. Thompson*, 18 Mo. 461. commented upon and explained.)—*Shaw et al. by Guard'n v. Gregoire*, 407.
4. *Supreme Court—Practice—Final Judgment.*—No appeal lies from the judgment "that partition be made" until the final confirmation of the report of the commissioners. An entry made by the judge upon the copy of the order attached to the report of commissioners "approved," &c., is not a judgment of the court. A judgment of confirmation of the report should be entered upon the record. The entry of an order refusing to sustain a motion to set aside the report, is not a final judgment in the cause. A judgment of partition and order of sale may be set aside at a term subsequent to that of the entry of the judgment, all the parties consenting,—*Papin v. Blumenthal et al.*, 439.
5. *Estoppel—Judgment—Landlord and Tenant—Conveyances.*—A judgment in partition estops the parties to the suit and all persons claiming in privity with them. The deed made by the sheriff under an order of sale in a suit in partition is the act of the parties themselves, and the purchaser at such sale is to be treated as a grantee within the meaning of the statute. (*G. S. 1865*, ch. 187, §§ 36 & 40.)—*Pentz v. Kuester*, 447.
6. *Tenants in Common—Ejectment—Practice—Action.*—One tenant in common cannot sustain a suit in partition if his co-tenant has disseized him and holds the possession adversely; the title of the plaintiff must first be established in an action of ejectment.—*Shaw et al. by Guard. v. Gregoire*, 407.

## PARTNERSHIP.

*Action—Bills and Notes.*—Where one of several partners executes a note in his own name for money borrowed, no action can be maintained against the firm for the consideration of the note, although the money may have been borrowed for the firm and applied to partnership purposes. The money received upon the note will be treated as an advance to the firm by the partner executing the note, and not as a loan to the partnership. (See *S. C. 35 Mo. 428.*)—*Farmers' Bk. of Mo. v. Bayliss et als.*, 274.

## PRACTICE, CIVIL.

See COURTS. CONSTITUTION. EJECTMENT. JURISDICTION. OFFICER.  
QUO WARRANTO. PROHIBITION.

PRACTICE, CIVIL (*continued*).

## PARTIES.

1. *Joinder—Judgment—Error*.—A joint judgment against several parties not jointly liable is erroneous, and the judgment will upon motion be arrested, or be reversed for error.—*Farmers' Bk. of Mo. v. Bayliss et als.*, 274.

## PROCESS.

2. *Effect of Sheriff's Return*.—Where the return of process served by the sheriff is regular upon its face, it is conclusive upon the parties to the suit, and the remedy of the party injured is by an action for a false return against the officer.—*Stewart et al. v. Scruggs et al.*, 400.
3. *Constructive Service*.—Where the statute provides for constructive service of process, the terms and conditions prescribed for such service must be strictly complied with. Several defendants cannot be constructively served with a writ by leaving only one copy for all at the usual place of abode.—*Id.*
4. *Partition—Guardian ad litem—Infants—Judgment*.—Until an infant be brought into court by proper service of process upon himself or his guardian, a court has no authority to appoint a guardian *ad litem* under the Partition Act of 1845—*R. C. 1845*, p. 765. A judgment of partition entered against infant defendants upon the appearance of a guardian *ad litem* appointed by the court without any service of process, is void. (*Hite v. Thompson*, 18 Mo. 461, commented upon and explained.)—*Shaw et al. by Guard'n v. Gregoire*, 407.

## PLEADINGS.

5. *Joinder of Actions—Error*.—Where different causes of action, although arising out of the same transaction, are united in the same count of the petition, the defect will be fatal on demurrer, motion in arrest of judgment, on writ of error or appeal, as the error appears on the face of the record.—*Peyton v. Rose*, 257.
6. *Negligence—Railroad Corporations*.—A petition by a railroad company charging that the animals of defendant unlawfully and by reason of the negligence of defendant entered upon the track of the road, and thereby plaintiff was injured, shows a good cause of action; plaintiff is not required to set forth the evidence in his pleadings, nor to set out the facts which show negligence in the defendant.—*Hannibal & St. Jo. R.R. Co. v. Kenney*, 271.
7. *Causes of Action—Motion to strike out*.—Where a cause of action upon a note is united with a cause of action upon the consideration thereof, the defect must be reached by motion to strike out the surplus matter.—*Farmers' Bk. of Mo. v. Bayliss et als.*, 274.
8. *Causes of Action—Parties—Demurrer*.—Where a cause of action to which some of the parties are liable is united in the same count with a cause of action against other parties who are not liable upon the first cause stated, the defect may be reached by demurrer or motion in arrest of judgment. (*G. S. 1865*, ch. 165, § 6.)—*Id.*
9. *Parties—Joinder—Judgment—Error*.—A joint judgment against several parties not jointly liable is erroneous, and the judgment will upon motion be arrested, or be reversed for error.—*Id.*

PRACTICE, CIVIL—PLEADINGS (*continued*).

10. *Answer—Demurrer*.—A party cannot demur and answer to the same subject matter.—*Long et al. v. Towl*, 398.
11. *Ejectment—Equity—Fraudulent Conveyance*.—In a bill to set aside a deed as fraudulent as to creditors, the plaintiff cannot sue for the recovery of the possession of the land. A bill in equity is not the proper remedy for the recovery of the possession of real estate, as there is an adequate remedy at law. When a decree is entered setting aside the conveyance as fraudulent, the plaintiff can then sue in ejectment for the recovery of the possession. In an action for the recovery of the possession of land, the defendant is entitled to a trial by jury. In a bill to set aside a conveyance as fraudulent as against a purchaser at sheriff's sale, the purchaser is not entitled to a decree against the fraudulent grantee vesting the title in the plaintiff; for if the conveyance was fraudulent, the grantee took no title as against the creditor.—*Peyton v. Rose*, 257.
12. *Joinder of Actions—Ejectment—Partition*.—A cause of action in ejectment cannot be united with a cause of action for partition of the premises sued for.—*Gott v. Powell et al.*, 416.
13. *Partition—Ejectment*.—An ejectment and partition cannot be united in the same count.—*Moreau et al. v. Detchemendy et als.*, 431.
14. *Replication*.—By the Practice Act of 1855, no replication to an answer was required to be filed unless the answer pleaded a set-off or counter-claim.—*R. C. 1855*, p. 1233.—*Powers v. Kueckhoff*, 425.
15. *Award—Arbitration*.—A replication to an answer setting up an award, denying the allegation of the answer, and stating that there never was any award made that had any binding force or validity, is sufficient.—*Fassett v. Fassett et al.*, 516.
16. *Cases in Equity and at Law—Trials*.—The pleadings in equitable cases are to be the same in form as in cases at law, and issues of fact or law are to be made up in the same way in both classes of cases; the evidence is to be produced under the same rules and to be preserved in the same way by bills of exceptions; exceptions, bills of exceptions, new trials, and appeals, are governed by the same provisions. In equity cases, all the material evidence should be incorporated into the bill of exceptions, for the case is to be heard in the Supreme Court upon the pleadings and the evidence, and the whole case will be passed upon by the Supreme Court and decided accordingly.—*State ex rel. Allen v. St. Louis Circuit Ct.*, 574.
17. *Motion to strike out*.—Where the answer denies the facts stated in the petition, it is improper to anticipate a case which it is supposed the plaintiff may attempt to make at the trial, and such matter should be stricken out.—*Singleton v. Pacific R.R.*, 465.

TRIALS.

18. *Evidence—Variance—Exceptions*.—Where objections are made to the admissibility of evidence on the ground of variance, objections must be taken at the trial and be preserved by bill of exceptions.—*Peyton v. Rose*, 257.
19. *Bill of Exceptions—Error—Supreme Court*.—The Supreme Court will not review the errors committed at the trial in the inferior court unless the er-

PRACTICE, CIVIL—TRIALS (*continued*).

- rors be saved by bill of exceptions. If the judge refuse to allow and sign the bill, it may be signed by three bystanders (G. S. 1865, ch. 169, § 29); but if the exceptions be not made part of the record by the bill, there is nothing preserved upon which the appellate court can act.—*Hoyt v. Williams, Garn., &c.*, 270.
20. *Verdict—Several Causes of Action—Arrest of Judgment.*—Where several causes of action are united in the same petition, a verdict must be found and damages assessed upon each cause of action separately, if the finding be for the plaintiff, or the judgment will be arrested.—*Pitts v. Fugate's Adm'x*, 405.
21. *Military Service—Judgment.*—By the provisions of the statutes of May 15, 1861 (Sess. Acts 1861, p. 46), and of Mar. 17, 1863 (Sess. Acts 1863, p. 30), a prohibition is placed upon the plaintiff in bringing suit against any person engaged in the military service of this State or of the United States, which precludes him from deriving any benefit from his suit except to prevent the bar of the statute of limitations. If the plaintiff bring his suit, procure constructive service of process, and proceed to take final judgment upon a default, the judgment will, upon proper motion and proof, be set aside at a subsequent term, and the execution thereon quashed. (*Bruns et al. v. Crawford et al.*, 34 Mo. 330; *Donnell v. Stephens*, 35 Mo. 441.)—*Piper v. Aldrich*, 421.
22. *Pleading.*—Where the plaintiff sues for the unlawful taking and conversion of property, he cannot at the trial recover as upon an implied contract of sale and delivery.—*Singleton v. Pacific R.R.*, 465.
23. *Instructions.*—Where the evidence offered by plaintiff at the trial does not legally tend to support the allegations of the petition, it is proper for the court to instruct the jury to return a verdict for the defendant; but where the evidence offered in any manner tends to prove the issues, the court should instruct the jury hypothetically, and leave them to find upon the facts.—*Id.*
24. *Jury.*—It is the part of the jury to weigh the testimony and reconcile the evidence presented, and to give their verdict according to what they believe to be the facts.—*Ewing v. Gass*, 492.
25. *Instructions.*—Instructions not supported by the evidence presented, are properly refused.—*Id.*
26. *Evidence.*—The admission of evidence out of its proper order is a matter within the sound discretion of the court trying the cause.—*Bailey v. Chapman*, 536.
27. *Trespass—Action—Damages.*—All persons who wrongfully contribute in any manner to the commission of a trespass, or who, after the same has been committed, assent to it, are responsible as principals, and each is liable to the extent of the injury done.—*Allred v. Bray*, 484.
28. *Trespass—Evidence—Action—Damages.*—In ascertaining the liability of a party sued in an action of trespass for taking goods, committed by several persons, it is only necessary to show that the defendant participated in the wrong done; the amount of property taken by him, if he took any, is wholly immaterial.—*Id.*

PRACTICE, CIVIL—TRIALS (*continued*).

29. *Verdict—Excessive Damages*.—In cases where nothing appears upon the record to justify the conclusion that there was anything corrupt or improper in the amount of damages found by a jury, the Supreme Court will not interfere with the verdict even though it may seem to be too large upon the facts proved.—*Id.*
30. *Damages—Trespass*.—In an action of trespass for breaking open the store of the plaintiff and taking and carrying away his goods, the mere value of the goods taken is not the measure of damages. The plaintiff is entitled to compensation for the injury done.—*Id.*

## NEW TRIALS.

31. *Motions for New Trial and in Arrest*.—Where motions for new trial and in arrest of judgment are filed upon the same day, it will be presumed that the motion for a new trial was first filed in order of time.—*Farmers' Bk. of Mo. v. Bayliss et als.*, 274.
32. *Appeal—Motion for New Trial or in Arrest*.—Before the party injured by the judgment can take his appeal or writ of error, he must give the inferior court the opportunity of correcting its own error, by filing a motion for a new trial or in arrest, or to set aside the judgment as entered. (G. S. 1865, ch. 172, § 6.)—*Long et al. v. Towl*, 398.
33. *Supreme Court—Partition—Final Judgment*.—No appeal lies from the judgment that "partition be made," until the final confirmation of the report of the commissioners. An entry made by the judge upon the copy of the order attached to the report of commissioners "approved," &c., is not a judgment of the court. A judgment of confirmation of the report should be entered upon the record. The entry of an order refusing to sustain a motion to set aside the report, is not a final judgment in the cause. A judgment of partition and order of sale may be set aside at a term subsequent to that of the entry of the judgment, all the parties consenting.—*Papin v. Blumenthal et al.*, 439.
34. *Mandamus*.—The Supreme Court will review the discretion of the inferior court in granting a new trial, only upon a proper application, by *mandamus*. In granting a new trial, the court is not necessarily confined to the grounds enumerated in the statute.—*Leahey v. Dugdale's Adm'x*, 517.

## SUPREME COURT.

35. *Appeals—Record—Amendments*.—After an appeal from the Circuit Court is prayed for and allowed, the record cannot be changed or altered by either party, nor can an entry be filed *nunc pro tunc*; and no addition can be made to the record, the court below ceasing to have any jurisdiction over it.—*Stewart et al. v. Stringer et als.*, 400.
36. *Error—Reversal—Restitution*.—The restitution to which a party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary. If the adversary party has acquired title to land or goods by virtue of his execution, if the judgment be reversed his title to the land or goods fails, and the land or goods must be restored in specie—not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bona fide*, or where a third person

PRACTICE, CIVIL—SUPREME COURT (*continued*).

has *bona fide* acquired some collateral right before the reversal. — *Gott v. Powell et al.*, 416.

37. *Reversed and Remanded* — *Circuit Court*. — Where a decree of the inferior court is simply reversed for error by the Supreme Court, and the case remanded for further proceedings, the inferior court is not required to enter up judgment for the appellant or plaintiff in error, but may re-try the case, following the opinion of the Supreme Court upon questions of law; except in cases where special directions are given by the Supreme Court. — *State ex rel. Allen v. St. Louis Circuit Ct.*, 574.

38. *District Court*. — The rules of practice established for the guidance of the District Courts (G. S. 1865, ch. 135) are also applicable to the Supreme Court. — *Id.*

39. *Final Judgment* — *Transcript*. — Stricken from the docket, the transcript not containing the record, but only the bill of exceptions, and thus not showing any final judgment in the cause. — *Robinson v. North Mo. R.R. Co.*, 465.

40. *Courts* — *District Court* — *Error and Appeals*. — The judgment of the District Court reversing the decision of the Circuit Court may be reviewed upon appeal or writ of error by the Supreme Court. The judgment of the District Court is a final judgment as far as that court is concerned. — *Strouse v. Drennan et als.*, 289.

41. *Error*. — Judgment affirmed for failure to assign errors and prosecute writ of error. — *Rodgers v. Rodgers et al.*, 493.

42. *Verdict* — *Jury*. — The Supreme Court will not weigh the testimony, to ascertain whether the jury found too much or too little in assessing the amount of damages sustained by the plaintiff. — *Steinberg v. Gebhardt*, 519.

43. *Courts* — *Jurisdiction* — *Hard Cases*. — It is better that an individual should be temporarily deprived of his rights than that the courts should overstep the boundaries of established precedent and sound construction, and annihilate the line which separates the legislative from the judicial functions. — *State ex rel. Breckenridge v. Cook*, 593.

44. *Trials* — *Immaterial Exceptions*. — The record showing that upon the merits, the verdict had been found for the right party, the court refuses to examine into the admission or exclusion of evidence as to matters of trivial importance or wholly immaterial. — *Miller et ux. v. Graham's Adm'r*, 509.

## PRACTICE, CRIMINAL.

1. *Supreme Court* — *Evidence* — *Appeals*. — On appeals or writs of error in criminal cases, the Supreme Court will examine the evidence given upon the trial, and will reverse the judgment if the verdict be not supported by the evidence. — *State v. Mansfield*, 470.

2. *Supreme Court* — *Writ of Error* — *Final Judgment*. — Writ of error dismissed for want of final judgment. — *State v. Brown*, 490.

3. *Courts* — *Exceptions* — *Appeals*. — The St. Louis Court of Criminal Correction is, by the statute creating it, always in session; but all appeals from any decision must be taken within three days after the trial, and bills of exceptions

PRACTICE, CRIMINAL (*continued*).

should be signed and filed before the appeal is taken. Where the counsel consent that time be granted to file bills of exceptions and take appeals, the consent should be entered of record.—State ex rel. Lawrence v. St. Louis Ct. Crim. Corr., 598.

4. *Costs—Execution*.—When a party indicted for a misdemeanor confesses the action and judgment is entered against him for the costs, if the defendant be unable to pay the costs, they must be paid by the county. (G. S. 1865, ch. 219.) A dismissal of the case at defendant's costs by an agreement of the defendant and prosecuting attorney with the assent of the court, is a confession of the action and is equivalent to a conviction. The issuing of an execution for costs by the clerk of the court is the proper method of determining the ability of the defendant to pay the costs.—State ex rel. Hopkins v. Buchanan Co. Ct., 254.

5. *Supreme Court*.—Judgment affirmed, appellants failing to prosecute their appeal from a judgment imposing a fine.—State v. Mullen et ux., 601.

## PRINCIPAL AND AGENT.

See CONTRACTS, 5, 9.

*Evidence—Parties—Husband and Wife*.—In an action by surviving partners upon a *quantum meruit*, the answer alleging a special contract made with the deceased partner, the defendant is not a competent witness under the statute (G. S. 1865, p. 586, § 1) to prove a special contract made by himself with the deceased partner. Where the wife acted as agent for her husband in making a contract, she is a competent witness to prove the terms of the contract, although the party with whom the contract was made had deceased—G. S. 1865, p. 586, § 5. The provisions of sec. 5 are not controlled or modified by those of § 1, ch. 144, G. S. 1865.—Stanton et al. v. Ryan, 510.

## PROHIBITION.

*Courts—Jurisdiction—Process*.—The writ of prohibition is issued to inferior courts to prevent the wrongful assumption or excess of jurisdiction. It will not lie to restrain the performance of ministerial acts, such as collecting taxes, locating county seats, and the like. The county courts, in locating or removing county seats, act in an administrative and not in a judicial capacity, and the Supreme Court will not issue the writ of prohibition to restrain their action however mistaken it may be.—State ex rel. West et als. v. Clark Co. Ct. et als., 44.

## Q

## QUO WARRANTO.

*Sheriff—Officer—Bond—Revenue*.—The statute requiring the sheriff to give bond within fifteen days is directory, and does not impose a condition precedent to the party's title to the office.—State ex rel. Att'y Gen'l v. Churchill, *ante* p. 41. The County Court must accept the commission issued by the Governor as evidence of the title to the office of sheriff in the party named; and having refused to recognize such party as sheriff and to pass upon the

QUO WARRANTO (*continued*).

sufficiency of the bond tendered by him, it has no authority subsequently to declare the office vacant and order a new election. If the party holding the commission was not legally elected, the opposing claimant can have the question tested by the proper process of *quo warranto* to oust the incumbent and to restore him to his rightful place.—State ex rel. Jackson v. Howard Co. Ct., 247.

## R

## REVENUE.

See COURTS 6, 8, 11, 12, 13.

1. *Expenditures—Officer—Auditor—Accounts.*—By the statute (G. S. 1865, ch. 10, the Auditor is made the general accountant of the State as to all claims payable out of the treasury, excepting only such claims as are expressly required by law to be audited and settled by other persons. A claim for costs for services rendered by the clerk of the St. Louis Criminal Court, although duly certified by the judge of that court and the circuit attorney, does not come within the class of excepted cases, and the Auditor may go behind the certificate and refuse to audit the claim. (See Morgan v. Buffington, 21 Mo. 549; State ex rel. McMurtry v. Auditor, 37 Mo. 176.) — State ex rel. Daily v. Auditor, 13.
2. *Union Military Bonds—Appropriations.*—The act of March 9, 1863 (Acts 1863, p. 25), appropriated the funds therein named, when the same should be received, to the payment of the Union military bonds to be issued under said act. The bonds issued under the act of February 25, 1865 (Acts 1865, p. 59), were to be paid out of the same fund, and the act of March 13, 1866 (Acts 1866, p. 95), provided the method of payment. The acts of March 11, 1867, and March 12, 1867, providing for a School fund, &c., did not repeal the provisions of the preceding acts providing for the payment of Union military bonds. — State ex rel. Kellogg v. Treasurer, 16.
3. *School Fund—Appropriation.*—By the statute, G. S. 1865, p. 269, § 59, the twenty-five per cent. of the general revenue of the State, to be appropriated to the University and Public Schools, is to be taken from the revenue collected in the year 1867. The act of March 13, 1867, repealing the proviso of § 59, p. 269, G. S., did not act retrospectively to appropriate the revenue collected in 1866.—State ex rel. Sup't of Pub. Schools v. Auditor, 25.
4. *Levy—Militia Tax, 1863—Omission.*—The military tax directed to be levied by the act of March 9, 1863 (Sess. Acts, p. 25), was to be levied in accordance with the general assessment made for that year. The general revenue act (G. S. 1865, p. 75) made the necessary provisions for a remedy in cases in which counties had omitted to levy the tax at the proper time, by requiring the clerk of the County Court to make out a supplemental tax-book for the collection of the omitted tax, upon the assessment for the year in which there was a failure to levy and collect the tax.—State ex rel. Auditor v. Clerk Jefferson Co. Ct., 683.
5. *Civil Officer—Penitentiary—Salaries.*—Except where special provision is otherwise made by the statutes, all claims against the State must be paid

REVENUE (*continued*).

to the party to whom the claim is due. The warden of the Penitentiary is not authorized to demand and collect the sums due by the State to persons employed by him; his contract with them, when approved by the inspectors, determines the amount of the salaries such persons are to receive from the State for services rendered.—State ex rel. Swift v. Treasurer, 590.

6. *Treasurer — Warrants.*—It is the province of the Treasurer to see that all warrants presented to him are drawn against the proper fund; and drawn in such manner as to make them, when paid, vouchers to show conclusively to whom and for what services the public moneys have been paid out.—*Id.*

7. *General Assembly—Journals—Printing.*—By the provisions of the statutes (G. S. ch. 7 & 20), the reports and documents presented to either house of the General Assembly constitute part of the journals required to be kept by the secretary and clerk, and are required to be printed as an appendix to the journals. The secretary of the Senate is therefore entitled to be paid for copies of such reports and documents furnished to the public printer, to be bound up with the reports of the daily proceedings.—State ex rel. Dyer v. Auditor, 240.

S

SECURITIES.

*Judgment — Evidence — Estoppel.*—Where judgment has been rendered against a principal and his security in a bond, and the security upon satisfying the judgment sues his principal for money paid to his use, the principal is estopped from alleging illegality or want of consideration in the bond.—Pitts v. Fugate's Adm'x, 405.

STATUTES, CONSTRUCTION OF.

See CONSTITUTION. EVIDENCE.

U

USES AND TRUSTS.

See MORTGAGES AND DEEDS OF TRUST. EQUITY.

W

WITNESSES.

*Evidence — Parties — Husband and Wife.*—In an action by surviving partners upon a *quantum meruit*, the answer alleging a special contract made with the deceased partner, the defendant is not a competent witness under the statute (G. S. 1865, p. 586, § 1) to prove a special contract made by himself with the deceased partner. Where the wife acted as agent for her husband in making a contract, she is a competent witness to prove the terms of the contract, although the party with whom the contract was made had deceased—G. S. 1865, p. 586, § 5. The provisions of § 5 are not controlled or modified by those of § 1, ch. 144, G. S. 1865.—Stanton et al. v. Ryan, 510.